

Women's Right to Abortion After Overturning *Roe v Wade*: Contextualizing the USA and Bangladesh

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Abstract: *The paper brings forward a critical analysis aiming to address the ramifications of overturning the judgment of Roe v Wade in the pronouncement of Dobbs v Jackson Women's Health Organization by the United States Supreme Court. The everlasting debate of pro-life v. pro-choice is highly unlikely to be resolved anytime soon. The domestic legal frameworks on abortion are underdeveloped in most countries, and the discrepancies among different legal frameworks make the recognition of right to abortion significantly challenging. Without a binding international legal instrument, the implementation of safe and legalized abortion is never guaranteed. While multiple countries took a progressive approach inspired by Roe, the recent overturning of such in 2022 creates the burning question of its ramifications in the US and beyond. Based mostly on doctrinal research and a 'survey numerical summary' conducted amongst 33 respondents studying or completing the course of 'Law and Ethics in Life Sciences,' this paper sets out to explore one fundamental question: Do we need a universal standard to ensure women's right to abortion in the post-Roe era? Besides delving into a critical analysis of Dobbs, the paper analyses pro-life and pro-choice advocacy strategies, different domestic and regional frameworks, and relevant human rights implications.*

Keywords: Abortion, Bioethics, Bangladesh, Pro-life, Pro-choice, Survey, USA.

I. Introduction

Abortion has always been a deeply contested partisan politics issue, rather than a human rights one. This is probably one of the key reasons why this issue, although conceptually ancient, does not have sufficient recognition under the domestic and legal frameworks worldwide. Texts from the ancient Hebrew times and the Greek times cited abortion¹; the concept has been embedded in our

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¹ Lambrini Kourkouta, Maria Lavdaniti, and Sofia Zyga, 'Views of ancient people on abortion'

history for a long time too. Whereas the method of abortion has significantly developed over time to reduce the health risk of the mother,² the ethical notion of the majority of common people still remains the same as before. All religions, including Islam,³ Christianity,⁴ Hinduism,⁵ Buddhism⁶, and Judaism,⁷ have taken a stance against abortion; the ethical perception remains the same for the majority of the people.

Despite being an ancient concept, there is no universal definition of abortion applicable to all jurisdictions. Abortion is a medical procedure performed to end a pregnancy.⁸ Depending on the stage of pregnancy, the procedure usually involves multiple steps. Miscarriage-inducing medications, such as mifepristone and misoprostol, may be used in early-stage abortions.⁹ Abortions performed at a later stage may necessitate a surgical procedure, such as aspiration or dilation and evacuation (D&E), in which the embryo is extracted from the uterus.¹⁰ A qualified healthcare professional typically administers the procedure in a clinical setting and may involve local anesthesia or sedation. It is essential to note that abortion procedures and regulations may vary by country, region, and legal restrictions.¹¹

(2013) 7(1) Health Science Journal 116.

² Taneja Ashima, Agrawal Vinita, and Rajaram Shalini, 'Early medical abortion: A new regimen up to 49 days' gestation' (2005) 45(2) Australian and New Zealand Journal of Obstetrics and Gynaecology 137.

³ Kiarash Aramesh, 'Abortion: An Islamic Ethical View' (2007) Iran J Allergy Asthma Immuno 29.

⁴ John T Noonan, 'Abortion and the Catholic Church: A Summary History' (1967) 12 Natural Law Forum 85.

⁵ Constantin-Iulian Damian, 'Abortion From the Perspective of Eastern Religions: Hinduism and Buddhism' (2010) 8(1) Romanian Journal of Bioethics 124.

⁶ *ibid.*

⁷ Lambrini Kourkouta, Maria Lavdaniti, and Sofia Zyga, 'Views of ancient people on abortion' (2013) 7(1) Health Science Journal 116.

⁸ ACOG, 'ACOG Guide to Language and Abortion' (2022) accessed 20 August 2023 <<https://www.acog.org/contact/media-center/abortion-language-guide>>.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

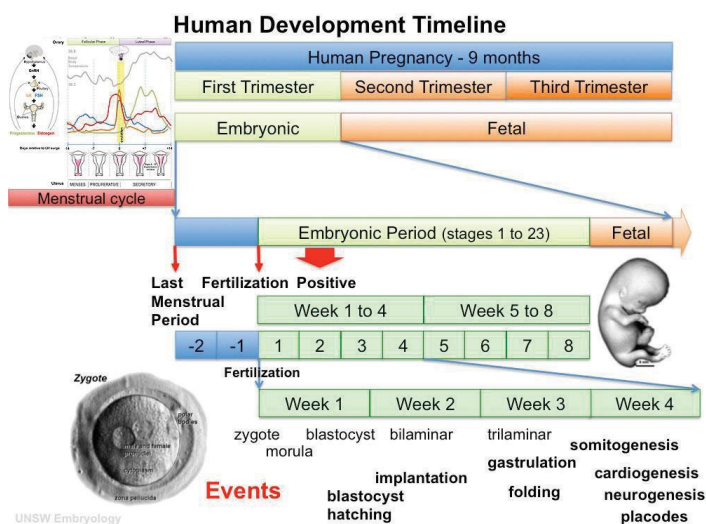


Figure 1¹²

With the growing practice of liberalism, abortion started to be permissible on certain grounds in different jurisdictions. The emergence of the pro-life vs. pro-choice debate ensured continued discussion over the moral, legal, medical, and religious aspects of induced abortion.¹³ With both sides having strong arguments in favour of their advocacy strategies, this longstanding debate is unlikely to be resolved soon, given its multilayered complexity.

Regardless, the legal framework of abortion started developing across the globe,¹⁴ although the current frameworks are clearly underdeveloped in most countries. There are various factors contributing to the enacting and development of abortion law in a country: prevalent political ideology, common religious faith and practice, socio-economic factors, cultural realities etc. For this reason, domestic abortion laws are often distinct from one another.

Just like many other disciplines of law, US precedents have played a significant role in influencing the laws on abortion in different countries. The

¹² Mark Hill, 'Human Development Timeline' (UNSW Embryology, 2023) <https://embryology.med.unsw.edu.au/embryology/index.php/Timeline_human_development> accessed 15 April 2023.

¹³ Thomas Groome, 'To Win Again, Democrats Must Stop Being the Abortion Party' (The New York Times, 2017) <<https://www.nytimes.com/2017/03/27/opinion/to-win-again-democrats-must-stop-being-the-abortion-party.html>> accessed 22 February 2023.

¹⁴ Center for Reproductive Rights, 'The World's Abortion Laws: The Definitive Record of the Legal Status of Abortion in Countries Across the Globe' (2023) <<https://reproductiverights.org/maps/worlds-abortion-laws/>> accessed 15 April 2023.

landmark judgment of *Roe v Wade*¹⁵ (hereinafter referred to as ‘*Roe*’) introduced a new dimension of pro-abortion reproductive rights in Texas, US. Beyond the boundaries of Texas and also beyond the US, *Roe v. Wade* has been frequently referred to create a pro-choice legal framework and recognize the reproductive rights of women. However, the landmark decision was overturned in 2022, creating controversy domestically and worldwide.

The pronouncement of the *Dobbs v Jackson Women’s Health Org*¹⁶ (hereinafter referred to as ‘*Dobbs*’) sparked waves of controversy around the world as it struck down women’s fundamental right to abortion declared in the US. Along with *Roe*, *Dobbs* also struck down the judgment of *Planned Parenthood of Southeastern Pennsylvania v Casey*¹⁷ (hereinafter referred to as *Casey*), which was pronounced 20 years later after deciding *Roe*. *Casey* clarified and refined the principles of *Roe* and balanced them by introducing certain limitations.¹⁸

This paper examines the global impact of overturning *Roe*, assessing its effects on safe abortions, women’s health, autonomy, and legal and ethical aspects. The survey was conducted to observe the perception of the respondents on the issue of abortion. The respondents viewed the subject differently. However, a fairly more liberal approach was observed from the survey numerical summary. The survey, therefore, tested the authors’ understanding and analysis of the subject in a reflective and more practical means. The numerical summary seemed to be the most appropriate means of utilising the data collected from/by employing the Google forms. Furthermore, the survey being conducted amongst the biolaw students, contributed to the formation of new knowledge and offered various practical insights.

II. Pro-Life vs. Pro-Choice Debate: Impact Analysis

A. Origin and Overview of the Debate

The pro-life vs. pro-choice debate, addressing the ethical, moral, and legal facets of abortion, originates from historical, religious, and philosophical shifts. Pro-life advocates, deeming the unborn as entitled to human rights, assert the fetus’s fundamental right to life.¹⁹ Justice Alito in *Dobbs* supports this stance²⁰,

¹⁵ *Roe v Wade* 410 US 113 (1973).

¹⁶ *Dobbs v Jackson Women’s Health Org* 597 US 3 No 19-1392, 2 (2022).

¹⁷ *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 846 (1992).

¹⁸ *ibid* 871-873, 877.

¹⁹ John Keowin, ‘International Human-Rights Law and the Unborn Child’ (National Review, 2010).

²⁰ *Dobbs* (n 20).

and it is often deemed to be backed by religious and moral,²¹ along with scientific considerations²² regarding fetal development.²³ Pro-life proponents aim to restrict abortion, endorsing adoption.

The traditional pro-life versus pro-choice debate is commonly critiqued for its binary framework, often overly simplifying complex ethical, socio-economic, and gender dimensions inherent in abortion governance.²⁴ A more analytical approach suggests moving beyond the moral absolutism often associated with this debate to adopt a functionalist perspective, emphasizing real-world impacts and outcomes of abortion laws. Functionalism, advocated by scholars like Rebouché and Tushnet, directs attention to the practical accessibility and implications of legal norms rather than their mere doctrinal or symbolic presence.²⁵ Consequently, assessing abortion policies through a functionalist lens necessitates rigorous empirical analyses of accessibility, health outcomes, and equity across diverse populations, effectively transcending the simplistic moral dichotomy and providing a nuanced framework suitable for addressing global reproductive rights post-Roe.²⁶

Conversely, the pro-choice movement champions personal autonomy,²⁷ emphasizing a woman's right to decide on her body,²⁸ including abortion. Pro-choice advocates argue that outlawing abortion infringes upon reproductive rights, bodily autonomy, and privacy,²⁹ stressing the social, economic, and health repercussions of unintended pregnancies.³⁰ They advocate for safe and legal abortion access as a vital element of reproductive healthcare.³¹

The legal discourse on pro-life vs. pro-choice encompasses various legal

²¹ Nancy S Jecker and Courtney S Campbell, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, Ronald Dworkin. New York: Alfred A. Knopf, 1993. 273 pp. (1994) 2(3) *Cambridge Quarterly of Healthcare Ethics*, 303-306.

²² Paula Katinas, "Medical Experts Say Science Is Proving Pro-Lifers Right" (The Tablet, 2022).

²³ *ibid.*

²⁴ Rosalind Dixon, 'Functionalism and Abortion Law Reform' (2010) 35(2) *Journal of Law and Society* 176, 179.

²⁵ Rachel Rebouché, 'Functionalist Approaches to Comparative Abortion Law' (2016) 41 *Yale Journal of International Law* 60, 62.

²⁶ Mark Tushnet, 'Comparative Constitutional Law: Functionalism, Expressivism, and Bricolage' (1999) 8 *International Journal of Constitutional Law* 122, 125.

²⁷ *Casey* (n 21).

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Rebecca J Cook, Joanna N Erdman, and Bernard M Dickens, *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014), 360.

³¹ *ibid.*, 179, 191.

aspects, including the constitutional right to privacy,³² balancing competing rights,³³ state regulation limits,³⁴ and defining when human life and rights begin.³⁵ Landmark cases like *Roe* and *Casey* set pivotal legal precedents shaping ongoing discussions.

In conclusion, the pro-life vs. pro-choice debate's complex origin involves historical, religious, philosophical, and ethical perspectives. Extensive legal literature, including numerous principles, doctrines, and precedents, continues to influence discussions on the ethical and legal dimensions of abortion.

1. *Pro-Life: Ethical Analysis*

Bioethics, a branch of applied ethics, delves into a vast array of philosophical, social, and legal issues within medicine and the life sciences.³⁶ One of its most contentious facets is abortion, an enduring ethical dilemma laden with significant legal implications.³⁷ This paper explores the pro-life perspective through the lens of legal bioethics, scrutinizing existing laws and ethical considerations while addressing gaps and loopholes.

Pro-life advocates safeguarding human life from conception to *conception to natural death* and *oppose abortion* as a morally and legally acceptable act.³⁸ However, the legal landscape surrounding abortion is intricate, with diverse interpretations across jurisdictions regarding *when human life begins* and the rights accorded to embryonic fetuses.³⁹ Legal frameworks, while existing, exhibit

³² *Roe* (n 19); *R v Morgentaler* (1988) 1 SCR 30; *Casey* (n 21); *A B and C v* (2010) IESC 45, *Attorney General (UK) v X* (2004) 1 IR 82; *Dobbs* (n 20), 9.

³³ *Roe* (n 19); *Paton v Trustees of British Pregnancy Advisory Service Trust* [1979] QB 276; *Casey* (n 21); *Morgentaler* (n 33); *Vo v France* [2004] ECHR 542; *Attorney General* (n 33); *Ireland* (n 33); *Dobbs* (n 20).

³⁴ *Paton v Trustees of British Pregnancy Advisory Service Trust* [1979] QB 276; *Dobbs* (n 20).

³⁵ *ibid*; *Vo* (n 34); *Dobbs* (n 20).

³⁶ Ruth Felicity Chadwick, 'Bioethics', *Britannica Encyclopedia* (2023) <<https://www.britannica.com/topic/bioethics>> accessed 22 March 2023; Josephine Johnston and Elizabeth Dietz, 'Bioethics: Key Concepts and Research' (Daily JSTOR, 2019) <<https://daily.jstor.org/bioethics-key-concepts-research/>> accessed 22 March 2023; David B Resnik, 'What is Ethics in Research and Why is it Important?' (National Institute of Environmental Health Sciences, 2020) <<https://www.niehs.nih.gov/research/resources/bioethics/whatis/index.cfm>> accessed 23 March 2023.

³⁷ Christina M Robinson, 'The Ethical Dilemma of Abortion' (2021) 3(1) *Journal of Student Research at Indiana University East*, 10-19 <<https://scholarworks.iu.edu/journals/index.php/jsriue/article/view/31847>> accessed 22 March 2023.

³⁸ *Dobbs* (n 20); BioExplorer, 'Top 15 Bioethical Issues in Biological Advancements' (2023) <<https://www.bioexplorer.net/bioethical-issues.html/>> Accessed 24 March 2023.

³⁹ HG Koch, 'When does human life begin? Legal considerations' (National Library of Medicine, 1993) <<https://pubmed.ncbi.nlm.nih.gov/8303918/>> accessed 23 March 2023.

deficiencies and loopholes, notably in two critical areas concerning outlawing abortion, partly or wholly,⁴⁰ others recognizing it as a right as a matter of reproductive freedom.⁴¹

Firstly, the absence of a universally accepted standard for when human life begins introduces interpretative challenges, fostering conflicting standards and legal ambiguity.⁴² This lack of clarity complicates ethical analyses, hindering the determination of embryonic fetuses' legal status and rights.

Secondly, inconsistencies in abortion-related legal standards contribute to ethical dilemmas. Jurisdictions may differ in restrictions on gestational age,⁴³ creating difficulties in balancing the rights of the unborn fetus with those of the expectant woman. This disparity raises questions about the fairness and equity of such laws.

Loopholes in pro-life laws are evident in some jurisdictions, criminalizing certain abortions but allowing exceptions for rape, incest, and fetal abnormalities.⁴⁴ Ethical analyses surrounding the pro-life stance involve complex considerations, emphasizing the absolute moral principles of deontological ethics. Pro-life proponents prioritize the inherent value of human life,⁴⁵ often disregarding the impact on the mother's life. Pro-life advocates may rely on ethical theories to support their position, such as deontological ethics,⁴⁶ grounded on absolute moral principles and rules⁴⁷, and prioritize human life's inherent value and dignity.⁴⁸ Additionally, they may consider the potential psychological and emotional impacts of abortion and the long-term social consequences of devaluing human life.⁴⁹

⁴⁰ World Population Review, 'Countries Where Abortion is Illegal 2023' (2023) <Countries Where Abortion Is Illegal 2023 (worldpopulationreview.com)> accessed 23 March 2023.

⁴¹ *ibid.*

⁴² Jeanne Marecek, 'Abortion in legal, social, and healthcare contexts' (2017) 27(1) *Sage Journal of Feminism and Psychology* <<https://doi.org/10.1177/0959353516689521>> accessed 23 March 2023; Ruth Felicity Chadwick, 'Bioethics', *Britannica Encyclopedia* (2023) <<https://www.britannica.com/topic/bioethics>> accessed 22 March 2023.

⁴³ World Population Review, 'Countries Where Abortion is Illegal 2023' (2023) <Countries Where Abortion Is Illegal 2023 (worldpopulationreview.com)> accessed 23 March 2023.

⁴⁴ *ibid.*

⁴⁵ Irene Van Staveren, 'Beyond Utilitarianism and Deontology: Ethics in Economics' (2007) 19(1) *Review of Political Economy* 21, 23.

⁴⁶ Irene Van Staveren, 'Beyond Utilitarianism and Deontology: Ethics in Economics' (2007) 19(1) *Review of Political Economy* 21, 23.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Brenda Major, 'Report of the APA Task Force on Mental Health and Abortion' (American Psychological Association, 2008) <<http://www.apa.org/pi/wpo/mental-health-abortion-report>.

Existentialism, however, contradicts the pro-life virtue. According to Jean-Paul Sartre, human existence begins with self-consciousness and decision-making, implying embryos attain 'human' status only when actively making choices.⁵⁰ So, if the embryos existed in life forms, they would not attain the status of 'human' until the process of making 'himself' begins, according to the school of existentialism.⁵¹

On the contrary, supporters of reproductive freedom contend that having an abortion is a deeply private matter that must be safeguarded as a matter of individual autonomy and bodily integrity.

2. *Pro-Choice: Ethical Analysis*

Pro-choice activists advocate for the right of an individual to make autonomous decisions concerning reproductive health that include the option of having an abortion.⁵² However, this principle has been met with legal and ethical challenges, particularly concerning the scope and limitations of this privilege and its moral implications.⁵³ One of the shortcomings of pro-choice arguments is the absence of consensus regarding the beginning of human life and personhood. Others argue that human life and rights commence at birth or at specific stages of fetal development.⁵⁴ This disagreement has resulted in legal anomalies and inconsistencies in pro-choice arguments, especially regarding abortion regulation.

Pro-choice arguments frequently rely on the notion of *bodily autonomy*, which asserts that individuals are entitled to make decisions regarding their own bodies without interference from the state or others.⁵⁵ However, this argument has been refuted on the grounds that fetal rights and interests should also be considered, given that the fetus is dependent on the mother's body for survival.⁵⁶

pdf> accessed 24 March 2023.

⁵⁰ Walter Kaufman, *Existentialism from Dostoyevsky to Sartre* (Vintage Books 1960).

⁵¹ Arif Jamil, 'Moral Philosophies and Ideologies Relevant for Life Sciences Research and their Regulation' (2017) vol 17 Dhaka University Law Journal 55, 57.

⁵² *Roe* (n 19); *Casey* (n 21).

⁵³ Hesti Armiwulan, 'Rights to Abortion, Pro-Choice vs. Pro-Life: Case of Indonesia and the USA' (2022) 17(2) International Journal of Criminal Justice Science 128 <<https://ijcjs.com/menu-script/index.php/ijcjs/article/download/523/381>> accessed 26 March 2023.

⁵⁴ Jeanne Marecek, 'Abortion in legal, social, and healthcare contexts' (2017) 27(1) Sage Journal of Feminism and Psychology <<https://doi.org/10.1177/0959353516689521>> accessed 23 March 2023; Ruth Felicity Chadwick, 'Bioethics', *Britannica Encyclopedia* (2023) <<https://www.britannica.com/topic/bioethics>> accessed 22 March 2023.

⁵⁵ *Roe* (n 19); *Casey* (n 21).

⁵⁶ M B Kapp, 'Ethical and legal issues in research involving human subjects: do you want a piece of me?' (2006) 59(4) Journal of Clinical Pathology 335 <<https://doi.org/10.1136/jcp.2005.030957>> accessed 25 March 2023.

This has led to legal debates over the balance between the rights and interests of the pregnant woman and the embryo and the implications for arguments in favour of abortion.

There are two dimensions of the apparent legal debate. Firstly, the right to privacy should safeguard the confidentiality of a woman's decision to have an abortion. This argument endorses that the right to privacy should safeguard the confidentiality of a woman's decision to have an abortion. According to *Roe*, the right to abortion is 'implicit in the concept of ordered liberty'⁵⁷ and is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁵⁸

According to pro-life proponents, the state has a legitimate interest in regulating and restricting abortion practices. Regulating and restricting abortion practices may be a legitimate state interest based on compelling reasons, which is a requirement of the strict scrutiny test⁵⁹ of the US jurisdiction,⁶⁰ such as protecting the potential life of the fetus, preserving public health, or promoting moral or ethical values.⁶¹

These arguments have led to legal loopholes and inconsistencies, especially concerning the regulation of abortion providers, facilities, and methods. Furthermore, ethical considerations play an important role in the pro-choice debate. Certain schools of moral philosophies and ethical principles such as utilitarianism,⁶² existentialism,⁶³ and deontology⁶⁴ may be interpreted to support⁶⁵ the right to choose an abortion,⁶⁶ pro-choice arguments frequently emphasize the

⁵⁷ *Roe* (n 19).

⁵⁸ *ibid*.

⁵⁹ *Ashcroft v American Civil Liberties Union* 535 US 564 (2002); *Wisconsin v Yoder* 406 US 205 (1972); *Sherbert v Verner* 374 US 398 (1963).

⁶⁰ Ronald Steiner, 'Compelling State Interest' (The First Amendment Encyclopedia, 2009) <<https://mtsu.edu/first-amendment/article/31/compelling-state-interest>> accessed 25 March 2023.

⁶¹ *Paton v Trustees of British Pregnancy Advisory Service Trust* [1979] QB 276; *Casey* (n 21); *Morgentaler* (n 33); *Vo* (n 34); *Attorney General* (n 33); *Ireland* (n 33); *Dobbs* (n 20).

⁶² Premium Papers, 'Ethical Theories on Abortion' (2023) <<https://premium-papers.com/abortion-four-ethical-theories/>> accessed 25 March 2023.

⁶³ Philosophical Investigations, 'Abortion and Ethical Theories: The Moral Status of the Foetus' (2008) <<https://peped.org/philosophicalinvestigations/abortion/>> accessed 2 March 2023.

⁶⁴ Andreas Matthias, 'Is Abortion Ethical?' (2022) <<https://daily-philosophy.com/ethics-of-abortion/>> accessed 25 March 2023.

⁶⁵ Philosophical Investigations, 'Abortion and Ethical Theories: The Moral Status of the Foetus' (2008) <<https://peped.org/philosophicalinvestigations/abortion/>> accessed 2 March 2023; Andreas Matthias, 'Is Abortion Ethical?' (2022) <<https://daily-philosophy.com/ethics-of-abortion/>> accessed 25 March 2023; Premium Papers, 'Ethical Theories on Abortion' (2023) <<https://premium-papers.com/abortion-four-ethical-theories/>> accessed 25 March 2023.

⁶⁶ Fredric G Reamer, 'Ethical Practice in a Post-Roe World: A Guide for Social Workers' (2023)

significance of *individual autonomy, physiological integrity, and reproductive freedom*.⁶⁷ Nonetheless, ethical analysis necessitates consideration of the potential consequences and implications of pro-choice arguments. Some contend, for instance, that pro-choice arguments devalue the sanctity of human life, promote a culture of convenience, and perpetuate social inequality.⁶⁸

Ultimately, framing abortion debates purely through ethical absolutes (pro-life vs pro-choice) overlooks the multidimensional realities of reproductive healthcare. Functionalist legal scholarship thus encourages evaluating abortion policies not merely based on their moral justifications but through measurable public health outcomes, social equity, and gender equality.⁶⁹ This approach provides a robust analytical framework, ensuring legislative decisions effectively reflect lived realities rather than abstract moral positions⁷⁰ and it will be further discussed in the paper.

III. Ramifications of Overturning *Roe v Wade*

A. A Brief Overview of *Dobbs v Jackson Women's Health Organisation* (2022)

The overturning of *Roe v Wade*,⁷¹ a landmark Supreme Court decision that established a constitutional right to abortion, has significant political, social, and legal consequences. The recent decision in *Dobbs v Jackson Women's Health Organisation*,⁷² in which a vote of 6-3 overturned *Roe v Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992),⁷³ has prompted widespread debate and discussion. This chapter examines this decision's domestic and international ramifications and concerns regarding the right to privacy and data protection. It emphasizes the significance of comprehending the far-reaching ramifications of *Roe v Wade*'s overturning and its impact on various aspects of society. *Dobbs v Jackson Women's Health Organisation* must be reviewed briefly in order to comprehend the current legal landscape surrounding abortion rights and constitutional protections.

68(2) OUP Social Work Journal 150.

⁶⁷ *Roe* (n 19).

⁶⁸ *Dobbs* (n 20).

⁶⁹ Rachel Rebouché, 'Functionalist Approaches to Comparative Abortion Law' (2016) 41 Yale Journal of International Law 60, 64.

⁷⁰ Mark Tushnet, 'Comparative Constitutional Law: Functionalism, Expressivism, and Bricolage' (1999) 8 International Journal of Constitutional Law 122, 127.

⁷¹ 410 US 113 (1973).

⁷² 597 US 3 No 19-1392, 2 (2022).

⁷³ 505 US 833 (1992).

1. Background of Dobbs v Jackson Women's Health Organisation

*Dobbs*⁷⁴ is a landmark case involving a challenge to a Mississippi law known as the 'Gestational Age Act,' which prohibits most abortions after 15 weeks of gestation. The case was filed in Federal District Court by Jackson Women's Health Organisation, the only licensed abortion facility in Mississippi, and one of its physicians. The United States Supreme Court ultimately considered the case and issued a ruling in June 2022, which resulted in overturning *Roe v Wade* (1973)⁷⁵ and *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992),⁷⁶ which had established and upheld a constitutional right to procure an abortion. *Dobbs* determined that the US Constitution never contained a right to abortion and returned the authority to regulate abortion to the States. The case has generated a great deal of attention and discussion regarding abortion rights in the United States.⁷⁷

2. Reasoning behind the decision of Dobbs v Jackson Women's Health Organisation

The court examined whether the right to abortion is 'rooted in the history and tradition of the United States'⁷⁸ and whether it is 'implicit in the concept of ordered liberty,'⁷⁹ which was upheld in *Roe*.

To examine the first issue, the court determined that *Roe* misrepresented history and that abortion has never been supported by American history and tradition. Alito noted that until the latter half of the 20th century, when the *Roe* decision was handed down, abortion was illegal in the majority of states,⁸⁰ and at the time of the adoption of the 14th Amendment in 1868, three-quarters of the States considered abortion a crime at all phases of pregnancy.⁸¹ Moreover, he continued that abortion in at least some stages of pregnancy was deemed a crime under Common Law, which American law followed until a wave of statutory restrictions expanded criminal liability for abortions in the 1800s.⁸² Furthermore, while punishments for abortion under Common Law may have varied, common-law authorities have never sanctioned abortion at any stage of pregnancy, much

⁷⁴ 597 US 3 No 19-1392, 2 (2022).

⁷⁵ 410 US 113 (1973).

⁷⁶ 505 US 833 (1992).

⁷⁷ Elizabeth Chloe Romanis, 'The end of (reproductive) liberty as we know it: A note on *Dobbs V. Jackson Women's Health* 597 USC __ (2022)' (2023) 23(1) *Medical Law International* 71-87 <<https://doi.org/10.1177/09685332231154562>> accessed 17 April 2024.

⁷⁸ *Dobbs* (n 20), 2, 13.

⁷⁹ *ibid*.

⁸⁰ *ibid* 193.

⁸¹ *ibid* 3, 27, 34.

⁸² *ibid*.

less considered it a privilege.⁸³ According to Alito, ‘*Roe* ignored or misstated this history, and *Casey* declined to reconsider *Roe*’s flawed historical analysis,’⁸⁴ resulting in the inescapable conclusion that the right to abortion is not deeply rooted in the nation’s history and traditions.⁸⁵

For the second issue, *Dobbs* held that the right to abortion did not satisfy the second criterion to be an integral part of ordered liberty. It was determined that *Roe* erred in its conclusion⁸⁶ that the concept of the right to personal liberty grounded in the 14th Amendment is wide enough to encompass a woman’s decision to terminate her pregnancy.⁸⁷ Moreover, Alito held that judicial precedents behind *Roe*’s reasoning did not concern the destruction of potential or foetal life.⁸⁸ *Griswold*⁸⁹ recognized the right of married couples to use contraceptives, *Eisenstadt*⁹⁰ established the same right for unmarried couples, *Loving*⁹¹ recognized a right to interracial marriage, and *Meyer*⁹² recognized the right of parents to control the education of their children. The same criticism applied to *Casey*’s use of precedents to support its conclusion that the right to abortion is implicit in the liberty of the due process clause, which is defined in part as the freedom to make ‘choices central to personal dignity and autonomy’⁹³ and as ‘the right to define one’s own concept of existence, meaning the universe, and the mystery of human life.’⁹⁴ Alito vehemently disagreed with *Casey* on this issue, arguing that the right to autonomy is too general to be implicit in the concept of ordered liberty because it ‘could license fundamental rights to illicit drug use, prostitution, and the like.’⁹⁵

3. *Ramifications of Overturning Roe v Wade*

It is essential to note that the right to abortion and its safe and legal access are complex and multifaceted issues and that the reversal of *Roe* would likely have far-reaching and evolving repercussions in the US and beyond. *Dobbs* is

⁸³ *ibid* 26.

⁸⁴ *ibid* 2, 24.

⁸⁵ *ibid* 33.

⁸⁶ *ibid* 128, 147.

⁸⁷ *Roe* (n 19) 153.

⁸⁸ *Dobbs* (n 20), 39.

⁸⁹ *Griswold v Connecticut* 381 U S 479 (1965).

⁹⁰ *Eisenstadt v Baird* 405 US 438 (1972).

⁹¹ *Loving v Virginia* 288 US 1 (1967).

⁹² *Meyer v Nebraska* 262 US 390 (1923).

⁹³ *Casey* (n 21), 851.

⁹⁴ *ibid*.

⁹⁵ *Dobbs* (n 20), 4, 40.

inextricably linked with an authoritarian legacy, and it will painfully resonate worldwide as a reminder that rights will be threatened with the authoritarian rule on the rise.⁹⁶

To thoroughly comprehend the implications of this decision and its potential impact on reproductive rights and access to safe, legal abortion, continued monitoring and analysis of legal, social, and political developments in the United States and abroad would be required.

3.1 Ramifications in the United States

The overturning of the *Roe* decision has significant legal ramifications in the United States, where it has been a landmark decision safeguarding the constitutional right ensuring access to safe and legal abortion for nearly half a century. Several states have already passed or are contemplating more restrictive abortion laws in response to the reversal of this ruling, resulting in a potential patchwork of regulations across the country.

Dobbs exhibited to Americans the reality of Poland, Ireland, and Chile that history does not inherently progress toward greater reproductive freedom.⁹⁷ The decision of the Supreme Court to overturn *Roe* will be felt most strongly by the estimated 80 million Americans who, according to the Centre for Reproductive Rights, no longer have access to abortion services.⁹⁸ However, it was extensively condemned by world leaders, the European Parliament, several United Nations agencies, and human rights specialists.⁹⁹

A major consequence is the increased likelihood that States will implement abortion prohibitions or severely restrict access to the procedure. In Wyoming, a State with a lengthy history of supporting anti-abortion legislation, the governor recently signed a ban on the majority of abortions.¹⁰⁰ North Dakota has also passed a law prohibiting most abortions, with a few exceptions.¹⁰¹ These prohibitions

⁹⁶ Lynn N Morgan, 'Global Reproductive Governance Around the World' (2023) 122(840) Current History 22-28 <<https://doi.org/10.1525/curh.2023.122.840.22>>accessed 10 April 2023.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ Pam Belluck, 'Wyoming Enacts Near-Total Ban on Abortion as *Roe* Fades' (New York Times, 2023) <<https://www.nytimes.com/2023/03/22/health/wyoming-abortion-ban.html?action=click&pgtype=Article&state=default&module=styl-n-abortion->>>accessed 10 April 2023.

¹⁰¹ Ava Sasani and David Chen, 'N. Dakota Supreme Court Blocks Abortion Ban; Says Constitution Protects Procedure' (New York Times, 2023) <https://www.nytimes.com/2023/03/16/us/north-dakota-abortion-ban.html?action=click&pgtype=Article&state=default&module=styl-n-abortion-us&variant=show®ion=MAIN_CONTENT_1&block=storyline_top_links_recirc->>accessed 10 April 2023.

pose a direct challenge to the principles established by *Roe* and could lead to protracted legal battles and ambiguity regarding the legality of abortion in these states.

The impact of medication abortion, which has become an increasingly prevalent method of abortion in recent years, is also significant. Utilizing medications to terminate a pregnancy, medication abortion is proven to be a safe and effective method. Nonetheless, a number of States, including Texas, have enacted legislation restricting or prohibiting the use of abortion medications.¹⁰² *Roe's* overturning could embolden States to further restrict or prohibit medication abortion, resulting in increased access barriers for those seeking this method.¹⁰³

The reversal of *Roe* also has significant implications for disparities in reproductive health, particularly among communities of colour.¹⁰⁴ Black, indigenous, and 'people of colour' individuals already confront significant disparities in access to reproductive health care, including abortion services, according to studies.¹⁰⁵ The overturning of *Roe* could exacerbate these disparities, further restricting marginalized communities access to safe and legal abortion.

In addition, overturning *Roe* could have far-reaching consequences for reproductive health care beyond abortion. *Roe* has served as a cornerstone for the preservation of reproductive rights, and its reversal could impose additional challenges to other reproductive healthcare services, such as contraception and fertility treatments. It must be noted that *Roe* must be seen as a floor, not a ceiling. Destroying the floor opens every possibility to open doors toward far-reaching implications for individuals in the United States pursuing a variety of reproductive health care services.

However, overturning *Roe* is not the end of the tunnel for reproductive rights in the USA, and the Women's Health Protection Act (WHPA) bears positive

¹⁰² Pam Belluck and Allison McCann, 'Lawyers Spar Before Judge Over Rescinding of Federal Approval of Abortion Pill' (New York Times, 2023) <https://www.nytimes.com/2023/03/15/health/abortion-pills-texas-lawsuit.html?action=click&pgtype=Article&state=default&module=styl-n-abortion-us&variant=show®ion=MAIN_CONTENT_1&block=storyline_top_links_recirc>.

¹⁰³ David S Cohen, Greer Donley, and Rachel Rebouché, 'The New Abortion Battleground' (2023) 123(1) <<https://ssrn.com/abstract=4032931>> accessed 17 April 2024.

¹⁰⁴ Michelle Goodwin, 'The Urgency for Reproductive Freedom: From Slavery to the New Jane Crow' (MS Magazine, 2022) <<https://msmagazine.com/2022/05/24/abortion-slavery-reproductive-freedom-13th-amendment-constitution-black-women-history/>> accessed 18 April 2024.

¹⁰⁵ Sally Howard and Geetanjali Krishna, 'Roe v Wade: How its scrapping will affect women worldwide' (2022) British Medical Journal 378 <<https://doi.org/10.1136/bmj.o1844>> accessed 10 April 2023.

implications. The Women's Health Protection Act (WHPA), a federal legislation, was filed in 2022 with the intention of codifying *Roe v Wade*, the famous ruling that protects a woman's right to an abortion at the federal level.¹⁰⁶ With no limits or bans on abortions that are medically unnecessary, the WHPA aims to establish new legal protection for the right to provide and receive abortion treatment.¹⁰⁷ It underlines that patients have the legal right to get abortion services without restrictions or constraints, such as specified testing or medical procedures,¹⁰⁸ and that healthcare practitioners have the legal right to provide those services.¹⁰⁹ The WHPA has been a source of discussion and controversy, with supporters praising its significance in ensuring reproductive equity and autonomy while critics voice worries about its effects on State laws and access to abortion.¹¹⁰

Another significant consequence for abortion healthcare would be the restructured education for Ob-Gyns tailored to comply with State-specific abortion bans. Currently, 45% of 286 accredited ob-gyn programs in the United States is operating under reinstated or newly implemented abortion bans resulting in 2,000 residents/trainee doctors annually not receiving requisite training, giving rise to concerns about a permanent impact on American healthcare and increased maternal morbidity.¹¹¹ A survey¹¹² of 2,063 physicians (licensed and trainee) revealed that 82% prioritize pro-abortion States while 76% refuse to apply to anti-abortion ones. A study¹¹³ by the Association of American Medical Colleges on residency program applications post *Dobbs* found a nationwide 5% decrease in applications to ob-gyn programs compared to a 10% drop in anti-abortion States. The numbers are startling, as time goes on, more concrete evidence is likely to

¹⁰⁶ Center for Reproductive Rights, 'Women's Health Protection Act (WHPA)' (2023) <<https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care/>>accessed 15 April 2023.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Women's Health Protection Act of 2022, s 41-32.

¹¹⁰ Thomas Jipping, 'Women's Health Protection Act: Unconstitutional and More Radical Than *Roe v. Wade*' (2022) <<https://www.nationalreview.com/bench-memos/womens-health-protection-act-unconstitutional-and-more-radical-than-roe-v-wade/>>accessed 15 April 2023.

¹¹¹ Maryn McKenna, 'States With Abortion Bans Are Losing a Generation of Ob-Gyns' (WIRED, 28 June, 2023) available at <https://www.wired.com/story/states-with-abortion-bans-are-losing-a-generation-of-ob-gyns/?utm_source=pocket_saves> accessed 19 July 2023.

¹¹² Simone Bernstein et al, 'Practice Location Preferences in Response to State Abortion Restrictions Among Physicians and Trainees on Social Media' (2023) *Journal of General Internal Medicine* available at < <https://link.springer.com/article/10.1007/s11606-023-08096-5#citeas>> accessed 19 July 2023.

¹¹³ Kendal Orgera et al, 'Training Location Preferences of U.S. Medical School Graduates Post *Dobbs v. Jackson Women's Health Organization Decision*' (AAMC, 13 April 2023) available at < <https://www.aamc.org/advocacy-policy/aamc-research-and-action-institute/training-location-preferences>> accessed 19 July 2023.

come to light concerning the impact of *Dobbs* and post-*Dobbs* abortion laws on availability and accessibility of abortion healthcare. The situation, at present, exhibits a grim picture for ob-gyn healthcare seekers in anti-abortion states.

3.2 Global Ramifications Beyond the United States

The overturning of *Roe* could have significant effects on reproductive rights and access to safe abortions worldwide, even beyond the US. In numerous nations, abortion is already restricted or illegal, and *Roe* has frequently served as a global advocate for abortion rights. *Roe*'s reversal could embolden anti-abortion movements in other nations, leading to more restrictive laws and policies. The overturning of *Roe* has amplified pro-life movements all over Europe, resulting in aggressive anti-choice harassment activities. The European Council has acknowledged it and adopted a resolution to prevent such activities.¹¹⁴

In countries such as Hungary, where abortion access is already severely restricted, the Government has introduced a 'listen to foetal heartbeat' rule requiring women to undergo an ultrasound and listen to the fetus's heartbeat prior to obtaining an abortion.¹¹⁵ This demonstrates how restrictive laws in one country can influence the policies of other nations by setting a precedent. However, even though this legislative change came into effect after the pronouncement of *Dobbs*, there is no evidence to suggest that it is a direct effect of overturning *Roe*.

In Africa, where access to safe and legal abortion is already restricted in many countries,¹¹⁶ the overturning of *Roe* could bolster anti-abortion movements and lead to more restrictive legislation. Kenya and Uganda, for instance, have recently witnessed an increase in anti-abortion activities, such as protests and lobbying for stricter abortion laws.¹¹⁷ The reversal of *Roe* could provide additional encouragement and justification for such initiatives in African nations, thereby limiting access to safe abortion.

In addition, the overturning of *Roe* could have an effect on international

¹¹⁴ Parliamentary Assembly, 'Access to abortion in Europe: stopping anti-choice harassment' (2022) Resolution 2439.

¹¹⁵ Weronika Strzyżyńska, 'Hungary tightens abortion access with listen to 'foetal heartbeat' (The Guardian, 2022) <<https://www.theguardian.com/global-development/2022/sep/13/hungary-tightens-abortion-access-with-listen-to-foetal-heartbeat-rule>>accessed 11 April 2023.

¹¹⁶ Center for Reproductive Rights, 'The World's Abortion Laws: The definitive record of the legal status of abortion in countries across the globe, updated in real time.' (2023) <<https://reproductiverights.org/maps/worlds-abortion-laws/>>accessed 28 March 2023.

¹¹⁷ Nosmot Gbadamosi, 'How a U.S. Abortion Ban Would Impact Africa' (Foreign Policy, 2022) <<https://foreignpolicy.com/2022/06/01/roe-wade-us-abortion-ban-africa-global-gag-rule/>>accessed 11 April 2023.

policies and funding.¹¹⁸ The United States has been a significant contributor to global health programmes, including reproductive health and family planning.¹¹⁹ The reversal of *Roe* could result in changes to US foreign policy and funding decisions, which could have repercussions for reproductive health programmes and services worldwide.¹²⁰

3.3 Ramifications for Bangladesh

Abortions in Bangladesh have historically been legal only when *necessary to save the life of the pregnant mother*.¹²¹ Any person inducing miscarriage or abetting to cause miscarriage without the consent of the mother is criminally liable. Besides, if a woman herself decides to conduct miscarriage of her own foetus, she is also criminally liable.¹²² Menstrual regulation (MR) has been a noteworthy workaround to the legal impediments of abortion in Bangladesh. It (MR) has officially been an interim part of the family planning programme of Bangladesh since 1979. Initially, MR was approved to be performed by a family welfare visitor (FMV) within 8 weeks, and by a doctor within 10 weeks of missed period. In 2012, nurses were also approved to provide MR, and in 2021, MR by medication (MRM) was approved for up to 10 weeks of missed period.¹²³ MRM refers to the use of misoprostol (with or without mifepristone) to induce menstruation up to 10-12 weeks post the last menstruation period for the purpose of regulating the menstrual cycle due to absence of menstruation for a short duration.¹²⁴ Even though MR and MRM can be performed up to 12 and 9 weeks respectively, resorting to clandestine, unsafe MR processes is still a common trend in Bangladesh.¹²⁵ The logistics of obtaining MR or post abortion care (PAC), barriers to MR

¹¹⁸ Maura Kitchens West and Zoe Johnson, 'The end of *Roe v. Wade*?' (Donor Tracker, 2022) <<https://donortracker.org/publications/end-ro-e-v-wade-implications-global-development>> accessed 11 April 2023.

¹¹⁹ *ibid*.

¹²⁰ *ibid*.

¹²¹ The Penal Code of 1860 (Bangladesh), ss 312.

¹²² *ibid*, ss 312-316.

¹²³ Directorate General of Health Services (DGHS) and Directorate General of Nursing and Midwifery (DGNM), Bangladesh National Comprehensive Menstrual Regulation (MR) and Post-Abortion Case (PAC) Services Guidelines (2021) at 6, available at < 2023-08-17-08-07-39bebdbec46b89694d1b6e036044173b.pdf> accessed 13 March 2025.

¹²⁴ WHO, "Abortion Policy Landscape: Bangladesh" (2019); Ministry of Health and Family Welfare (MOHFW) Directorate General of Family Planning (DGFP), Directorate General of Health Services (DGHS) and Directorate General of Nursing and Midwifery (DGNM), Bangladesh National Comprehensive Menstrual Regulation (MR) and Post-Abortion Case (PAC) Services Guidelines (2021) available at < 2023-08-17-08-07-39bebdbec46b89694d1b6e036044173b.pdf> accessed 13 March 2025.

¹²⁵ Marie Stopes Bangladesh, "Safe Abortion for Every Woman" available at < Safe Abortion for Every Woman (SAFE) - Marie Stopes Bangladesh> accessed 13 March 2025.

(prescription of medication by untrained providers), negative provider attitude, lack of standardization among providers concerning MR gestational age further complicates MR access & management in Bangladesh.¹²⁶ As a result, there have been a considerable number of unsafe abortions and associated complications, which have raised the rates of maternal morbidity and mortality.¹²⁷

Implementation of SRHR has always been subject to religious extremism, where women have always been the prime victim.¹²⁸ As a consequence of overturning *Roe*, anti-abortion extremists in Bangladesh may feel emboldened to seek even stricter abortion restrictions, which would restrict women's access to *safe and legal abortion* services and create a *bad precedent for the developing world*.

There also has been notable anti-abortion activities in Bangladesh after the pronouncement of the *Dobbs* judgment. After the draft opinion of *Dobbs* got leaked, Nabeeha Kazi Hotchins, President and CEO at PAI (Population Action International) has opined that groups opposed to the advancement of sexual and reproductive health and rights were 'using this as additional fuel for why access to abortion and SRHR is not something Bangladesh should be moving forward with'.¹²⁹ This observation was based on data provided by a local Bangladeshi organization that collaborates with PAI.¹³⁰

Furthermore, reversing *Roe* would affect Bangladesh's legal approach to contesting the country's current abortion legislation. Legal advocates and women's rights activists have used legal channels to campaign for women's reproductive rights and challenge the nation's restrictive abortion laws.¹³¹ The legal defenses

¹²⁶ Bonnie Crouthamel et al., "Out-of-clinic and self-managed abortion in Bangladesh: menstrual regulation provider perspectives" (2021) 18:69 Reproductive Health.

¹²⁷ Guttmacher Institute, 'Fact Sheet: Menstrual Regulation and Unsafe Abortion in Bangladesh' (2017) <<https://www.guttmacher.org/fact-sheet/menstrual-regulation-unsafe-abortion-bangladesh>> accessed 12 April 2023.

¹²⁸ Naripokkho, 'Religious Extremism and Comprehensive Sexual and Reproductive Health and Rights in Secondary and Higher Secondary Education in Bangladesh' (2016) <<https://arrow.org.my/publication/religious-extremism-comprehensive-sexual-reproductive-health-rights-secondary-higher-secondary-education-bangladesh/>> accessed 12 April 2024; United Nations, 'Conference on Women and Violent Extremism in Bangladesh' (2022) <<https://bangladesh.un.org/en/188964-conference-women-and-violent-extremism-bangladesh>> accessed 12 April 2024.

¹²⁹ Michael Igoe, 'Devex Newswire: The global fallout from the US abortion ruling' (Devex, 2022) <<https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care/>> accessed 12 April 2023.

¹³⁰ *ibid*.

¹³¹ Psyne Wadud, 'Challenging abortion laws in Bangladesh: In need of a multi-pronged judicial strategy' (Ejil Talk: 2021) <<https://www.ejiltalk.org/challenging-abortion-laws-in-bangladesh-in-need-of-a-multi-pronged-judicial-strategy/>> accessed 12 April 2023.

put out by these campaigners and their efforts to challenge the abortion regulations in Bangladesh may be weakened by the overturning of *Roe*. Moreover, the future of the writ petition filed by Syeda Nasrin, which had the potential to open the doors of abortion rights in Bangladesh, also faces contra precedent.¹³²

Although historically *Roe v Wade* had limited direct doctrinal influence within Bangladesh's judicial framework, it has symbolically represented a global benchmark for reproductive rights advocacy.¹³³ Recently, Bangladeshi reproductive rights activists and legal scholars have increasingly relied on the principles articulated by *Roe* when advocating for reforms to Bangladesh's restrictive laws.¹³⁴ In particular, ongoing domestic litigation challenging the restrictive abortion provisions of Bangladesh's Penal Code has invoked human rights discourses paralleling arguments from *Roe*.¹³⁵ Consequently, *Roe's* overturning indirectly impacts Bangladeshi advocacy by weakening a key international precedent frequently cited as persuasive support. This transitional connection exemplifies how shifts in influential jurisdictions can shape the trajectory of reproductive rights activism domestically, underscoring the importance of establishing explicit universal standards grounded firmly in international human rights law.¹³⁶

Additionally, the availability of financing and support for reproductive health services in Bangladesh may be impacted by the overturning of *Roe*. When promoting reproductive health and rights around the world, international organizations and donors frequently utilize *Roe* as a benchmark.¹³⁷ The consequences of overturning *Roe* may lead to reproductive health programs in Bangladesh getting less financial and technical support, which might further restrict access to safe abortion services and harm women's reproductive health outcomes.

In the current world, there exists the potential to increase the tendency to accept the norms of private international law. Recognition of the private rights of

¹³² International Planned Parenthood Federation, 'Fighting for Abortion Rights in Bangladesh: Interview with lawyer Syeda Nasrin' (2021) <<https://sar.ippf.org/blogs/fighting-abortion-rights-bangladesh-interview-lawyer-syeda-nasrin>> accessed 12 April 2023.

¹³³ Sarah McCammon, 'The End of *Roe* has Implications for Abortion Rights Around the Globe' (NPR, 29 June 2022) <https://www.npr.org/2022/06/29/1107657652/the-end-of-ro-e-has-implications-for-abortion-rights-around-the-globe> accessed 17 March 2025.

¹³⁴ Coalition for Feminist Movement (CFM), 'Abortion Laws in Bangladesh: An Analysis from the Human Rights Perspective' (CFM, 2022) <https://www.asap-asia.org/pdf/abortion-laws-in-bangladesh-human-rights-perspective.pdf> accessed 17 March 2025.

¹³⁵ *ibid.*

¹³⁶ Manuela López Restrepo, 'The Global Influence of *Roe v. Wade* on Abortion Advocacy' NPR (Washington, 24 June 2022) <https://www.npr.org/sections/goatsandsoda/2022/06/24/1107260379/the-global-impact-of-overturning-ro-e-v-wade> accessed 17 March 2025.

¹³⁷ Share-Net Bangladesh, '*Roe v Wade* and Bangladesh' (2022) <<https://www.share-netbangladesh.org/ro-e-v-wade-and-bangladesh/>> accessed 12 April 2023.

foreign nationals (existing in his/her country of origin) and recognition of foreign judgments will become more frequent as humans approach a more technologically advanced and challenging society. An illegal action in the USA regarding a private right may impact accessing civil rights in another part of the world. Will the USA recognize all the civil rights of a national of another country (available in his/her country of origin) on its soil, even if it is illegal for its own citizens? Therefore, this interconnectivity of legal affairs (recognition of foreign law/judgment) leads to one question: Will the USA revise its approach to private international law? Bangladesh can have a *liberal legal norm* on reproductive rights of women, despite it diminishing in the USA, a global power.

3.4 The Necessity of Universalizing Abortion

Nepal's legal framework surrounding abortion exhibits a strong case as to why a universal standard of the right to abortion is necessary. In 2002, Nepal amended its Penal Code allowing abortion contingent upon the woman's consent up to 12 weeks' gestation regardless of ground, and up to 18 weeks in case of rape or incest, or danger to the life of the pregnant woman, or in case fetal abnormality.¹³⁸ The Right to Safe Motherhood and Reproductive Health Rights Act (2018)¹³⁹ (SMRHR) mandates that every woman shall have the right to obtain abortion services up to 12 weeks of gestation, and up to 28 weeks in case of rape or incest, risk to the life or health of the pregnant woman, probability of fetal deformity or incompatibility with life, or in case of any incurable disease.¹⁴⁰ The Right to Safe Motherhood and Reproductive Health Regulation (2020)¹⁴¹ outlines safe abortion service methods and the conditions for the service providers to facilitate them. In 2009, the Supreme Court of Nepal recognized the right to abortion as an "inseparable part of women's human rights" & held the government accountable for establishing the required infrastructure and implementing the policies to ensure the affordability and accessibility of abortion.¹⁴² Pursuant to changes in the legal framework, safe abortion services are facilitated at the federal, provincial,

¹³⁸ Mahesh Puri, Anand Tamang, and Susheela Singh, "Addressing Gaps in Safe Abortion Services in Nepal" (2022) Guttmacher Institute.

¹³⁹ Government of Nepal, Nepal Law Commission. The Right to Safe Motherhood and Reproductive Health Act. 2018 <https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Right-to-Safe-Motherhood-and-Reproductive-Health-Act-2018.pdf>. Accessed March 13, 2025.

¹⁴⁰ Bibek Kumar Lal et al., "Policy change to improve access to safe abortion care in federal Nepal" (2024) International Journal of Gynecology Obstetrics 164(Suppl. 1) 61-66.

¹⁴¹ Government of Nepal, Nepal Law Commission. The Right to Safe Motherhood and Reproductive Health Regulation. 2020 <https://publichealthupdate.com/the-right-to-safe-motherhood-and-reproductive-health-regulation-2020/>. Accessed March 13, 2025.

¹⁴² Lakshmi & Others v. Government of Nepal, Decision No. 8464, N.K.P. 2067, (Vol. 9) at 1551 (2009).

and local levels, including through outreach mechanisms.¹⁴³

The noteworthy positive legal advancements aside, the progression is still far from complete. At present, the Penal Code and the SMRHR embody different, if not contrasting legal standards concerning abortion in Nepal.¹⁴⁴ The SMRHR permits abortion up to 28 weeks, whereas the Penal Code allows only 18 weeks. The SMRHR defers to the Penal Code for abortions beyond what is permitted under it and the Penal Code, meaning that abortions beyond 28 weeks gestation are still criminalized in Nepal. Furthermore, miscarriage is still regarded as abortion under the SMRHR meaning a woman could be criminally liable for a miscarriage under the ambit of the standard set by SMRHR.¹⁴⁵ This is on top of already existing barriers such as geography, infrastructure issues, accessibility issues, social stigma, and lack of awareness concerning abortion rights continue to hinder access to safe abortion services in Nepal.¹⁴⁶ A universalized standard of the right to abortion can potentially dissipate contradictory legislation or policy positions on abortion.

No UN human rights convention or regional human rights treaty, with the exception of the Maputo Protocol, contains an explicit right to abortion.¹⁴⁷ However, most African states have yet to implement the Maputo Protocol in their domestic courts, and any relevant ruling in the African Court of Human and People's Rights (ACHPR) is absent.¹⁴⁸ The discussions concerning international law¹⁴⁹ have revealed a lack of uniformity in international law regarding abortion, which is most likely due to the fragmentation of numerous treaties, which are subject to differing interpretations and are not always ratified by all States.

¹⁴³ Alok Atreya et al., "Striving toward safe abortion services in Nepal: A review of barriers and facilitators" (2024) Health Science Reports.

¹⁴⁴ Mahesh Puri, Anand Tamang, and Susheela Singh, "Addressing Gaps in Safe Abortion Services in Nepal" (2022) Guttmacher Institute.

¹⁴⁵ Center for Reproductive Rights (CRR) and Forum for Women, Law and Development (FWLD), Decriminalization of abortion in Nepal: Imperative to uphold women's rights (Factsheet 2021) available at < https://reproductiverights.org/wp-content/uploads/2021/06/Decriminalization-of-Abortion-in-Nepal_02June021_Final-Version-1.pdf > accessed March 13 2025.

¹⁴⁶ Claire Rogers et al., "Medical abortion in Nepal: a qualitative study on women's experiences at safe abortion services and pharmacies" (2019) Reproductive Health 16:105; Alok Atreya et al., "Striving toward safe abortion services in Nepal: A review of barriers and facilitators" (2024) Health Science Reports; Bibek Kumar Lal et al., "Policy change to improve access to safe abortion care in federal Nepal" (2024) International Journal of Gynecology Obstetrics 164(Suppl. 1) 61-66.

¹⁴⁷ Elin Malmköld, 'The status of abortion in public international law and its effect on domestic legislation' (LLM Dissertation in Public International Law and Human Rights, Uppsala University, 2018).

¹⁴⁸ *ibid*, 18.

¹⁴⁹ *ibid*.

Moreover, not universally recognizing abortion rights may also have negative consequences for women and severe repercussions for the entire community on multiple levels, especially after overturning *Roe*.¹⁵⁰ One of the consequences is that women's reproductive autonomy in terms of terminating pregnancies will not be protected directly by a universal human rights standard. Moreover, this gives sovereign states may decide to prohibit or even criminalize abortion through national law. Another dire consequence is that restrictive abortion laws are interlinked with higher numbers of unsafe abortions, maternal morbidity, and mortality.¹⁵¹ In a world without *Roe*, abortion must be recognized as a fundamental human right that would allow and protect women's reproductive health rights and autonomy over their bodies and lives. This would be a step in ensuring that the right to therapeutic abortion is universally and uniformly protected in all nations.

In addition, universal recognition of abortion rights is also necessary as it is also intended for that of the partner, the children, and thus the entire community apart from women (as scientifically proven).¹⁵² *A dialogue between the scientific community and international law and order* is an essential instrument for harmonizing the right to therapeutic abortion and protecting it from political, cultural, and religious influences.¹⁵³ A combined effort by the international scientific community and organizations is required to institute scientific protocols and justify the ban on 'abortion access restrictions'. The presence of international scientific protocols would not only allow for more uniform guidance of legal bodies in the event of appeals but would also legitimize more stringent measures against noncompliant States.¹⁵⁴ Similar to what is done with economic sanctions against nations that do not respect international law in the military sphere.¹⁵⁵

We advocate for interventions and sanctions against nations that do not respect human rights pertaining to abortion.¹⁵⁶ It is not feasible for the international community to employ double standards when it comes to the universal, indivisible, interdependent, and interconnected nature of human rights. Formation of an international treaty may sound like an ideal situation, but it is currently very challenging as it is subject to ratification and adaptation by the

¹⁵⁰ *Roe* (n 19).

¹⁵¹ Iqbal Shah and Elizabeth Ahman, 'Unsafe abortion: Global and regional incidence, trends, consequences, and challenges (2009) 31(12) J ObstetGynaecol Can 1149–1158.

¹⁵² *ibid* 10.

¹⁵³ Adrea Cioffi and Others, 'The Importance of the International Community in Protecting the Right to Abortion: The Cases of Malta and of the US Supreme Court' (2023) 11(4) Healthcare 520, 10.

¹⁵⁴ *ibid*.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid*.

States and political, cultural, and religious divides adds to the current polarization trend of the world. However, universally *recognizing abortion as a fundamental right* would be a step towards the right direction.

IV. Universal Application of Reproductive Rights: Lessons Learnt from WHO Abortion Care Guidelines

The debate around abortion transcends the dichotomy of privacy versus autonomy, as it is deeply embedded within broader issues of gender equality. Feminist legal theorists like Reva B. Siegel and Catharine MacKinnon argue that reproductive rights are central to women's substantive equality and bodily integrity, positioning abortion as a necessary condition to overcome systemic gender discrimination.¹⁵⁷ International human rights instruments such as CEDAW further strengthen this view, urging states to explicitly integrate reproductive rights as an essential component of gender equality and anti-discrimination obligations.¹⁵⁸ This approach suggests that international law and domestic jurisdictions must align their legislative and policy frameworks to recognize reproductive autonomy as integral to gender equality.

A. Functionalism as an alternate methodology

A common pattern of comparative law emerged from the juxtaposition of laws and principles that may help to identify 'the evolving standards of decency to mark the progress of a maturing society'.¹⁵⁹ This method is not free from controversies as it has been rejected for being irrelevant and weak. According to Justice Antonine Scalia, "the American conception of decency is dispositive,¹⁶⁰ and using foreign law in the interpretative discourse of the court is irrelevant as it demands the determination of whether a practice was accepted among our (American) people."¹⁶¹ Moreover, in the 'cultural' argument of 'Reflections on the Originalists' Objections',¹⁶² importing foreign legal principles in national jurisprudence is not appropriate if it's divorced from the cultural context of

¹⁵⁷ Catharine A MacKinnon, 'Privacy v Equality: Beyond Roe v Wade' in MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 93; Reva B Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261, 262.

¹⁵⁸ UN Committee on Elimination of Discrimination against Women, General Recommendation No. 24 on Women and Health (CEDAW/C/GC/24, 1999) [31].

¹⁵⁹ *Trop v Dulles* 356 US 86, 101 (1958).

¹⁶⁰ *Stanford v Kentucky* 492 US 361, 391 (1989).

¹⁶¹ *ibid.*

¹⁶² Jo Eric Khushal Murkens, 'Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections' (2008) 41(1) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 32, 34, 37 <<https://www.jstor.org/stable/43239423>> accessed 26 March 2023.

their origin, as judges are assumed not to have any ideas regarding ‘surrounding jurisprudence’.¹⁶³ In the context of comparative abortion law and implementation, Rachel Rebouché identified the aforementioned common method as weak and ineffective.¹⁶⁴

The common comparative methodology may be identified as a symbolic citation to determine whether comparative law is cited for aligning a country’s law with *Roe* of the United States¹⁶⁵ in its affirmation of women’s rights¹⁶⁶ or with Germany’s 39 *BVerfGE*¹⁶⁷ or in its affirmation of the protection of unborn life,¹⁶⁸ or to suggest a compromise between the two, these comparisons provide a consistent and easily identifiable framework for adjudicating on abortion law reform. Scalia identified this as an ‘ideological’ comparison where foreign laws are invoked when the law conforms with the thinking of the judges and declines it when it goes against the ideology of the comparer.¹⁶⁹ Moreover, Chief Justice Roberts noted during his confirmation hearing that ‘Foreign law, you can find anything you want¹⁷⁰ and that ‘looking at foreign law for support is like looking out over a crowd and picking out your friends.’¹⁷¹ Abortion law reform is evaluated and legitimized based on a highly stylized, abstract set of rights delineated by what the US¹⁷² and German¹⁷³ decisions have come to represent.¹⁷⁴

The purpose of this chapter is to present an alternative comparative methodology that prioritizes an evaluation of abortion laws in their functional

¹⁶³ Norman Dorsen, ‘The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer’ (2008) 3(4) *International Journal of Constitutional Law* 519, 528

¹⁶⁴ Rebecca, *Abortion Law in Transnational Perspective* (n 31).

¹⁶⁵ *Roe* (n 19).

¹⁶⁶ *ibid.*

¹⁶⁷ 39 *BVerfGE* I.

¹⁶⁸ *ibid.*

¹⁶⁹ Jo Eric Khushf Murkens, ‘Comparative Constitutional Law in the Courts: Reflections on the Originalists’ Objections’ (2008) 41(1) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 32, 36 <<https://www.jstor.org/stable/43239423>> accessed 26 March 2023.

¹⁷⁰ NY Times, ‘Second Day of Hearings on the Nomination of Judge Roberts’ (2005) <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?_r=1&pagewanted=all> accessed 26 March 2023.

¹⁷¹ *ibid.*

¹⁷² *Roe* (n 19).

¹⁷³ Bundesverfassungsgericht [Federal Constitutional Court] (1975) 39 *BVerfGE* 1 (Ger) translated in Robert E Jonas and John D Gorby, ‘West German Abortion Decision: A Contrast to *Roe v. Wade*,’ *John Marshall Journal of Practice and Procedure* 9 (1976): 605–684.

¹⁷⁴ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 101.

capacity, i.e., a methodology that investigates how law functions in practice to facilitate or impede women's access to safe abortion.

1. Definition of Functionalism

Mark Tushnet has identified three modes of comparison to address the erroneous comparative methodologies that compare law without paying due consideration to the cultural context of the law of origin.¹⁷⁵ They are 'Functionalism',¹⁷⁶ 'Expressivism',¹⁷⁷ and 'Bricolage'.¹⁷⁸ This chapter of the article aims to establish a dichotomy between laws relevant to abortion and abortion practice through an alternative comparative method, 'functionalism', and utilize it to bridge the gap between abortion laws and practice by implementing public health law research methodologies.

Functionalism serves to identify different provisions that serve a similar function in different jurisdictions.¹⁷⁹ It might help evaluate whether the constitutional system of a country can improve a certain function by using a legal rule developed in another jurisdiction to perform a specific function.¹⁸⁰ Rosalind Dixon expanded the meaning of this method of comparison by terming it as 'empirical' in nature.¹⁸¹

A functionalist method begins by identifying the objective of a rule and then provides a criterion for evaluating the rule's merits or how well rules serve their purposes.¹⁸² Rebouché terms it as an appreciation of how background rules function is consistent with a larger trend in comparative law that embraces legal realism and demonstrates an appreciation for ethnographic research.¹⁸³

1.1 Core Concept of Functionalism

According to Rebouché, what abortion law reform accomplishes in practice, be it access, prohibition, or compromise, is neither compared nor otherwise evaluated, and constitutional litigation does not serve this function.¹⁸⁴

¹⁷⁵ Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108(6) *The Yale Law Journal* 1225-1309.

¹⁷⁶ *ibid* 1228.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid*.

¹⁸¹ Rosalind Dixon, 'How to Compare Constitutionally: An Essay in Honour of Mark Tushnet' (2020) *UNSWLRS* 1, 4.

¹⁸² James Gordley, "The Functional Method," in *Methods of Comparative Law*, ed. Pier Giuseppe Monateri (Cheltenham: Edward Elgar Publishing, 2012), 107-119.

¹⁸³ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 98-117, 112.

¹⁸⁴ *ibid*.

The case law establishes an abstract relationship between legislative form and constitutional rights, such as restrictions or grounds for abortion to protect unborn life and protecting liberties to respect the rights of women.¹⁸⁵ Means for access to abortion services or whether services are more available, more affordable, or more expedient to access is beyond the scope of this evaluation.¹⁸⁶ Liberal laws may promise liberal access and restrictive laws that restrict access but empirical studies, frequently in the public health field, demonstrate this belief is unfounded.¹⁸⁷ Neither legislative form nor constitutional norm entirely governs abortion practice, and formal legal norms are not essentially the rules of access.¹⁸⁸

1.2 Utility of functionalism

As a methodology, functionalism comparison evaluates the functional efficacy of policies and practices by analyzing their outcomes in achieving their intended objectives.¹⁸⁹ It focuses on the outcomes or consequences of policies as opposed to their declared goals or ideologies.¹⁹⁰ The comparison of functionalism entails contrasting and evaluating various policies or practices based on their performance and impact and identifying best practices or lessons learned from successful examples.¹⁹¹ This pragmatic, empirical, and results-oriented approach can provide valuable insights for policymaking and governance in a variety of disciplines, including reproductive health.

B. A Comparative Approach to Deal with Diverse State Policies: A Post-Roe World

Comparative abortion legislation rarely considers culture and context.¹⁹² The constitutional rights and legislative procedures analyzed in US¹⁹³ and German¹⁹⁴ case law reflect only a small portion of abortion laws and conventions. However,

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 98-117.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² Aníbal Faúndes and Ellen Hardy, 'Illegal Abortion: Consequences for Women's Health and the Health Care System' (1998) 58 *International Journal of Gynecology and Obstetrics*, 79–80.

¹⁹³ *Roe* (n 19).

¹⁹⁴ Bundesverfassungsgericht [Federal Constitutional Court] (1975) 39 *BVerfGE* 1 (Ger) translated in Robert E Jonas and John D Gorby, "West German Abortion Decision: A Contrast to *Roe v. Wade*," *John Marshall Journal of Practice and Procedure* 9 (1976): 605–684.

a critical comparativist may study foreign legal reforms to learn how they work.¹⁹⁵ They can even study questions such as “[h]ow do women seek abortion inside and beyond the law?”¹⁹⁶ or “[w]hat laws allow or restrict abortion in a country?”¹⁹⁷ Comparing constitutional rights and abortion statutes is crucial, but focusing on these may overlook other legal norms affecting abortion access.¹⁹⁸

The usual comparative method used by the Courts is not necessarily concerned with the practice of abortion under the laws they cite.¹⁹⁹ Interestingly, the suggestion that the United States²⁰⁰ and Germany²⁰¹ are at the opposite ends of a spectrum marked by liberalization²⁰² and criminalization²⁰³ may be flipped.²⁰⁴ Abortion services are less available in certain regions of the United States, where women have a constitutional right to abortion on any ground before viability, than they are in Germany, where abortion remains an *unlawful*, though *not punishable*, act.²⁰⁵

In Germany, women can go to counseling centers that make them aware of their rights rather than fetal life. A report issued by a European counselling center, Pro Familia affirms allowing women to decide whether to continue their pregnancy or not, recognizing their fundamental human right of family planning.²⁰⁶ For the women struggling to decide, Pro Familia preaches their counselling based on the concepts of ‘individuality, equality of rights and personal autonomy.’²⁰⁷ Similar groups also maintain that is consistent with ‘science and the respect for the final decision and responsibility of the woman (openness of result).’²⁰⁸ However, before overturning *Roe*, the US required that deciding women must be made aware of information regarding possible negative physical or psychological consequences

¹⁹⁵ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 98-117.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 101.

²⁰⁰ *Roe* (n 19).

²⁰¹ 39 BVerfGE 1.

²⁰² *Roe* (n 19).

²⁰³ 39 BVerfGE 1.

²⁰⁴ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 103.

²⁰⁵ Rachel Rebouché, ‘Comparative Pragmatism’ (2012) 72(1) *Maryland Law Review* 85, 90.

²⁰⁶ European Women’s Health Network, ‘State of Affairs: Concepts Approaches, Organizations in the Health Movement, Country Report: Germany’ (Hanover: Landesvereinigung für Gesundheit Niedersachsen e.V, 2000), 123.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

due to abortion.²⁰⁹

The cost and affordability of abortion also indicate the flipside situation between the US and Germany.²¹⁰ Germany's State Welfare program funds 80% of the abortions in the country, including counseling, which is unlawful but unprosecuted, but women in financial need are an exception.²¹¹ In contrast, around 13% of the women in the US get access to state funding²¹², and 60% of the women pay out of their own pockets.²¹³ Moreover, the Hyde Amendment allows state-funded abortion only in case of threat to the pregnant woman's life and in cases of incest or rape.²¹⁴

Several academics and researchers have used functionalism comparison to evaluate and compare reproductive health policies and practices in various contexts. For instance, Rebouché evaluated and compared reproductive health policies in the United States and the United Kingdom based on their adherence to human rights principles, effectiveness in achieving public health objectives, and promotion of gender equality.²¹⁵ Rebouché argued that a comparison of functionalism could help identify best practices and lessons learned and influence the creation of more effective and rights-based reproductive health policies.²¹⁶

Others have utilized functionalism comparison to evaluate the impact of particular reproductive health policies or practices on women's health outcomes, such as perinatal mortality, morbidity, and contraceptive use.²¹⁷ Comparing the

²⁰⁹ *ibid*; Casey (n 21).

²¹⁰ Rebecca, *Abortion Law in Transnational Perspective* (n 31), 103.

²¹¹ *ibid*.

²¹² Rachel K Jones and Others, 'Characteristics of U.S. Abortion Patients, 2008' (New York Guttmacher Institute, 2010), 1 <<http://www.guttmacher.org/pubs/US-Abortion-Patients>> accessed 26 March 2023. pdf.

²¹³ *ibid*.

²¹⁴ Adam Sonfield and Others, 'Public Funding for Family Planning, Sterilization and Abortion Services, FY 1980–2006,' Occasional Report No. 38 (New York: Guttmacher Institute, 2008), 6 <<http://www.guttmacher.org/pubs/2008/01/28/or38.pdf>> accessed 26 March 2023; National Abortion Federation, 'Public Funding for Abortion: Medicaid and the Hyde Amendment (2006), 1 <http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/publ_ic_funding.pdf> accessed 27 March 2023.

²¹⁵ *ibid*.

²¹⁶ *ibid*.

²¹⁷ Monoarul Haque and Others, 'A Comparative Study on Knowledge about Reproductive Health among Urban and Rural Women of Bangladesh' (2015) 9(1) J Family Reprod Health 35-40; Marge Berer, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 18(2) Health and Human Rights Journal 18(2) 13-27; Abigail R A Aiken, 'Self-reported outcomes and adverse events after medical abortion through online telemedicine: population based study in the Republic of Ireland and Northern Ireland' (2017) BMJ 357.

impact of restrictive versus liberal abortion laws on women's health outcomes, for instance, some studies have found that *restrictive laws are associated with higher rates of unsafe abortion, maternal morbidity, and mortality*, whereas *liberal laws are associated with safer abortion practices and better health outcomes*.²¹⁸ These studies have demonstrated the significance of adopting evidence-based and rights-based reproductive health policies, such as those recommended by the WHO Abortion Care Guidelines 2022.²¹⁹

Several studies have compared the implementation of abortion policies in various states or countries and identified differences in the availability, accessibility, and quality of abortion services, such as waiting periods, mandatory counselling, and gestational limits.²²⁰ These studies have highlighted the significance of ensuring that reproductive health policies are effectively implemented and enforced to ensure access to safe and timely abortion care.

In addition, functionalism comparison has been used to evaluate the impact of reproductive health policies on social justice and human rights, including the impact on marginalized and vulnerable populations, such as women of color, low-income women, and LGBTQ+ individuals.²²¹ Some research indicates that restrictive reproductive health policies disproportionately impact these populations, resulting in health disparities and violations of their rights to health and equality.²²² These findings highlight the significance of adopting inclusive and intersectional reproductive health policies that address all individuals' specific needs and vulnerabilities.

The literature on *reproductive governance and functionalism* also addresses the influence of ethics on abortion care policies. The importance of ethics in guiding policy decisions regarding reproductive health, including issues such as *autonomy, informed consent, privacy, and the moral standing of the foetus*,

²¹⁸ *ibid.*

²¹⁹ Bele Ganatra, 'From concept to measurement: operationalizing WHO's definition of unsafe abortion' (2014) 95(3) *Bulletin of the WHO*, 241-248.

²²⁰ *ibid.*; Manjulaa Narasimhan, 'Self-care interventions for sexual and reproductive health and rights for advancing universal health coverage' (2019) 28(2) *Sexual Reproduction Help Matters*, 741-743.

²²¹ Dorothy E Roberts, *Killing the Black Body: Race, Reproduction, and The Meaning of Liberty* (Vintage, 1998); Camille Garnsey, 'Cross-country abortion travel to England and Wales: results from a cross-sectional survey exploring people's experiences crossing borders to obtain care' (2021) 18(1) *Reproductive Health Journal* 103.

²²² *ibid.*

cannot be overstated. Cook²²³ and Arora²²⁴ have investigated the application of functionalism in evaluating and comparing ethical frameworks and principles in the context of reproductive governance.²²⁵ These studies underscore the significance of incorporating *ethical considerations into reproductive governance policies* and how functionalism can be implemented in a framework to ensure and *respect women's rights and autonomy*.

Functionalism can provide a common framework for comparing and evaluating reproductive health policies and practices across the globe as a comprehensive and evidence-based resource for *safe abortion care based on human rights principles* and supported by international and national health organizations.²²⁶ For example, the World Health Organization (WHO) released new guidelines on abortion care on 9 March 2022 that aim to prevent over 25 million yearly unsafe abortions worldwide.²²⁷ This guideline acknowledges the *critical role of health workers in providing quality, non-judgmental care* and emphasize the significance of their training, support, and protection in ensuring secure abortion services.²²⁸

Nevertheless, it is essential to recognize that functionalism comparison, like all methods, *has limitations*. It may not encompass all of the complexities and nuances of reproductive health policies and practices, nor may it accurately reflect the diverse cultural, social, and political contexts in which reproductive governance operates. Furthermore, it may be influenced by subjective judgments and biases without considering the perspectives and experiences of the directly affected people. Therefore, it is essential to ensure that functionalism comparison is *utilized transparent, inclusive, and participatory* and that the *voices and rights of individuals* and communities are at the center of the evaluation and development of reproductive health policies and practices.

²²³ Rebecca J Cook and Bernard M Dickens, 'From Reproductive Choice to Reproductive Justice' (2009) 106(2) Int Journal of Gynecology and Obstetrics, 106-109.

²²⁴ Kavita Shah Aurora, 'Female genital alteration: a compromise solution' (2016) 42(3) Journal of Medical Ethics 148-154.

²²⁵ Rebecca, 'From Reproductive Choice to Reproductive Justice' (n 194); Kavita Shah Aurora, 'Female genital alteration: a compromise solution' (2016) 42(3) Journal of Medical Ethics 148-154.

²²⁶ WHO, 'WHO issues new guidelines on abortion to help countries deliver lifesaving care' (2022) <<https://www.who.int/news/item/09-03-2022-access-to-safe-abortion-critical-for-health-of-women-and-girls>> accessed 12 April 2023.

²²⁷ WHO, 'WHO issues new guidelines on abortion to help countries deliver lifesaving care' (2022) <<https://www.who.int/news/item/09-03-2022-access-to-safe-abortion-critical-for-health-of-women-and-girls>> accessed 12 April 2023.

²²⁸ *ibid*, 31-100.

V. Survey Data Analysis Results: Survey Numerical Summary

This chapter incorporates the *survey numerical summary* of the study conducted amongst the Dhaka University LL.M. students of the course ‘Law and Ethics in Life Sciences.’ The numerical survey was prepared and conducted using Google Sheets. The data collected through the survey is analyzed and interpreted through a quantitative approach. The sample size is relatively small but deserves attention as all the respondents have training in law and ethics in life sciences. Authors believe this simple study outcome may indicate how graduate students trained in biolaw consider the related issues to pursue policy direction.

The numerical summary shows how the respondents think on certain issues relating to the right to abortion. Despite being a relatively low sample-sized study, the outcome deserves certain attention, considering the respondents are future legal professionals with sound legal understanding and specific knowledge of the subject matter. The respondents answered the questionnaire online by filling out a Google form from 14 July 2023 to 20 August 2023.

A total of 9 (nine) questions were asked to the anonymous respondents. The total number of respondents was 33, 18 male and 15 female participants. All respondents were supposed to have acquired some knowledge of the subject (questionnaire). Respondents, being current, fresh graduates, and regular students of the Dhaka University LL.M. program have the age range between 20 to 30 (assumed).

Question 1 states that ‘*Do you think Dobbs v Jackson Women’s Health Org 597 US 3 No 19-1392 (2022) (the judgment that overturned constitutional right to abortion secured by Roe v Wade) will bring dire implications toward global reproductive rights governance?*’ examined the impact globally on the other territories beyond the US jurisdictions.²²⁹ Largest number of the respondents (63.63%) underscored that the judgment that overturned the constitutional right to abortion secured by *Roe v Wade* will bring dire implications toward global

²²⁹ In a unique scenario, our team faced an unusual issue with the Google Form. Following the addition of a new field called ‘Gender’, responses to one of the existing questions (No. 1) ceased to appear in the Google Form Response view. We sought guidance from Lead Software Engineer Rezaul Hasan, an expert in enterprise solutions, regarding this matter. Since Google Form is a free tool, seeking customer support for this unusual behavior was not an option. Nonetheless, Mr. Hasan pointed out several reasons to trust the authenticity of the form data. To begin, Google stores Google Form data separately, and responses cannot be edited from the Google Form Portal. Furthermore, Google Form data can be exported to spreadsheet or Excel formats. This export feature can be used multiple times, but it is optional and necessitates a link with an Excel file. Additionally, when exported form data is modified or updated in the linked Excel/spreadsheet file, Google does not alter the original form data. This ensures the preservation of the original responses. Lastly, we have obtained and included the email addresses of each respondent. Reviewers have complete access to the survey table, enabling them to reach out to respondents for verification of response authenticity.

reproductive rights governance, and hence, the other countries that have the application of private international laws need to carefully assess their citizen's civil rights in the US territory and the implications of the change in their own territory. However, 12.12% of the respondents *disagree* with that anticipation. 18.18% of the respondents *strongly agrees* that *Dobbs v Jackson Women's Health Org* 597 US 3 No 19-1392 (2022) will bring dire implications toward global reproductive rights governance, therefore, other countries need to be concerned about the implications. On the contrary, none of the respondents *strongly disagrees*. 6.06% of the respondent opted for *other opinion*.

The trends in the US legislation also commonly impact international jurisprudence, often even paving the way (for example, anti-abortion movements subsequent to the pronouncement of *Dobbs* in Italy, India, Kenya, Nigeria, and Ethiopia).²³⁰

When asked '*[t]he right to abortion is embedded in the concept of ordered liberty (upheld in Roe) and is broad enough to encompass a woman's decision whether or not to terminate her pregnancy*' (question no. 2), 33.33% of the respondents expressed that they strongly agree and A good number of the respondents showing the association between the 'concept of ordered liberty' and the woman's right to abortion (45.45% of the respondents agrees that the concept of ordered liberty accommodates women's right to abortion). On the contrary, 18.18% of the respondents disagrees and none of the respondent strongly disagrees with that idea. 3.03% respondent had other opinion. For further clarification, the concept of Ordered Liberty was first introduced in the US legal system through the 14th Amendment. According to *Roe*, individual liberty is a component of the fundamental right to privacy and it is broad enough to incorporate woman's right to abortion.

Roe, being overturned, does not leave much room for applying the concept of ordered liberty as a binding or persuasive precedent unless *Dobbs* is overturned in the near future. However, the question still remains very relevant for the legal interpretations to allow future development of the laws. 78.78% of the respondents acknowledged the broad scope of *Roe*, and interestingly enough, not one respondent strongly disagreed with Questions 1 and 2. It indicates that the concepts and rationale that prevailed in *Roe* are likely to be relevant to the legal framework of abortion in the upcoming years, according to the majority of the respondents.

In question 3, the respondents were asked: '*Do you think that the interrelated rights such as the right to life, health, privacy, freedom from discrimination,*

²³⁰ Erica Hellerstein, 'Roe's repeal energized Africa's anti-abortion movement' (*Coda*, 19 September 2023) available at https://www.codastory.com/waronscience/dobbs-abortion-global-impact/?utm_source=pocket_saves accessed 23 September 2023.

and freedom from Torture or Cruel, Inhuman, or Degrading Treatment can be harmoniously interpreted to encompass “abortion as a fundamental right”?’. For further clarification, these rights have been enshrined in major international human rights instruments, and they may be interpreted as including abortion rights as interrelated factors, as explained in the WHO Abortion Care Guideline 2022. 0.30% of the respondents opted for the choice ‘strongly agree; 48.48% of the respondents opted for the option ‘Agree’; 3.03% of the respondents selected the option ‘strongly disagree’ 18.18% of the respondents ‘disagree’; none of the respondents opted for ‘other opinion’.

Furthermore, the respondents of the survey, being experienced law students mostly acknowledge the broad scope of various human rights, although 21.21% of the respondents does not view abortion being included in them.

Question no. 4 asked: *‘Do you think that it is high time that the right to abortion should be declared a “fundamental right” along with additional protocols to govern safe abortion?’.* 27.27% of the respondent strongly supports (strongly agree) that the right to abortion should be declared a ‘fundamental right’ to govern safe abortion, and 39.39% of the respondents support (agree) this notion. On the contrary, 3.03% of the respondents strongly reject (strongly disagree) this idea, whereas 27.27% of the respondents disagree. 3.03% of the respondents had other opinions.

Using a more direct approach than question 3, question 4 identifies the pro-life vs. pro-choice advocates. Recognizing abortion as a fundamental right is rather a bold step toward pro-choice. Bangladesh, being a conservative patriarchy, has always regarded abortion as a negative action, penalizing it with super narrow exceptions. With 66.66% of respondents agreeing to recognize abortion as a right, it indicates that the well-trained and a *significant portion of younger generations are taking a more liberal approach towards abortion*, willing to modify the age-old legal, social, and religious traditions.

Question no. 5 explored the significance of bioethical aspects in ensuring sound and just legal principles. We asked: *‘Do you think that bioethics considerations (when life begins, the status of the unborn, moral philosophy theories, etc.) should be given importance while formulating rules pertaining to safe abortion?’.* 45.45% of the respondents strongly agree, and 42.42% of the respondents agree. On the contrary, 3.03% of the respondents strongly disagree, and 6.06% of the respondents disagree. However, 3.03% of the respondents had other opinions.

87.87% of respondents endorse incorporating bioethical aspects into legal rule formulation. Abortion laws, rooted in religious and social morality, transcend social, economic, religious, and cultural distinctions in most jurisdictions.

Respondents, well-versed in life sciences laws and ethics, highlight how a deep understanding of bioethics can guide legislatures in creating a cohesive legal framework on abortion. This is supported by the relevance of responses to question no. 6.

Question no.6 suggests coordination between the legislators and the scientific community to formulate rules pertaining to reproductive healthcare governance and safe abortion. Our question was: *‘To formulate such rules, do you think a collaboration between the legislators and the scientific community is necessary?’*. 66.66% of the respondents strongly agree, and 33.33% of the respondents agree. On the contrary, none of the respondents either strongly disagrees or disagrees. No respondents had other opinions as well.

This is the only question where *all respondents unanimously agree on developing a coordination between the legislators and the scientists*. While the world regularly debates over the ethical concerns of abortion, the scientific aspects are neither sufficiently recognized nor discussed.

Question no.7 discusses the significance of the latest abortion guidelines promulgated by WHO. We asked: *‘Do you think that the “WHO Safe Abortion Guidelines 2022” can bear a significant effect on worldwide reproductive rights governance?’*. 18.18% of the respondents strongly agree on the significance of the WHO Safe Abortion Guidelines, and 75.75% agree. None of the respondents disagreed or strongly disagreed, while only 6.06% of the respondents held other opinions.

In a country like Bangladesh where vast majority of our laws were enumerated in the colonial era, we rely on international framework and guidelines from time to time expecting more apt and effective remedies. The WHO Guideline, although not binding, is widely recognized across the globe. No express disagreement shows the mindset to *welcome and rely on the health-related global frameworks*; especially to the countries where knowledge, expertise and resources are scarce.

Question no. 8 touches upon the necessity of Bangladeshi abortion laws being amended. We asked: *‘Do you think a revision of Bangladeshi laws relating to abortion and reproductive rights is necessary to accommodate the evolving needs of society?’*. 51.51% of the respondents strongly agrees and 42.42% agrees that Bangladeshi abortion laws should be amended. On the other hand, none strongly disagree with this notion, but the remaining 6.06% disagrees.

Bangladesh’s abortion laws, dating back to the colonial era, lack consideration of contemporary developments. A substantial 93.93% support revising these outdated laws, with only 6.06% opposed. Notably, no female respondents disagreed with Questions 7 and 8, signaling women’s keen interest in aligning

the laws with international standards. The colonial laws echo patriarchal notions, highlighting the need for updated legal provisions to uphold women's equal rights as per the Constitution of Bangladesh.²³¹

Question No. 9 suggests a correlation between socio-economic realities and abortion laws. Our question was: '*Should socio-economic realities and availability of support systems be considered while tailoring abortion laws?*'. 18.18% strongly believe, and 75.75% believe that socio-economic considerations and availability of support systems must play a role in tailoring abortion laws. While no one denies the significance of such consideration, only 6.06% held other opinions.

However, a vast majority of 93.93% of the respondents opined in favour of considering socio-economic factors while tailoring abortion laws, indicating that the socio-economic context is a crucial factor that cannot be overlooked. Just like Question no. 7 & 8, Question No. 9 was also answered affirmatively by all female respondents.

VI. Conclusion

The survey numerical summary found certain remarkable results worth paying attention. A good number (48.48%) of the respondents opted for the option 'agree' in response to the question no. 3 indicating that there could be an association between the 'interrelated rights' and 'abortion rights' and hence, the right to abortion can be interpreted to be the fundamental right for those in extreme urgency of accessing the service (when linked to their right to life, health, privacy, freedom from discrimination, and freedom from Torture or Cruel, Inhuman, or Degrading Treatment). However, when tested in a more direct way without reference to any interrelated rights, the respondents showed a different pattern. When asked if the right to abortion be declared a 'fundamental right' to govern safe abortion, 27.27% of the respondents strongly supported (strongly agree), and 39.39% of the respondents supported (agree) this notion, whereas 27.27% of the respondents disagreed. It indicates that the majority (27.27% and 39.39%) *supports the idea of declaring the right to abortion as a fundamental right*. Furthermore, A very high number (18.18% strongly agree and 75.75% agree) shows a correlation between the 'socio-economic realities and availability of the resources' with the 'framing of the law.'

Abortion can be considered a taboo in Bangladesh in some social settings and be a stigma for an unmarried girl, having detrimental consequences for the woman's social well-being post-abortion. The cultural progress in the psyche of the society is very minute with the change of time in Bangladesh. Furthermore, if a girl is raped and gives birth to a child outside a legitimate marriage, she is

²³¹ The Constitution of the People's Republic of Bangladesh 1972, art 27.

still stigmatized. Therefore, the availability of safe and legal abortion facilities may be *essential* in some cases (in Bangladesh) while securing an increased and higher level of privacy and protection of the identity (maintaining anonymity) of the woman.

Some recommendations based on the discussion of the paper are as follows:

Firstly, the *recognition of the right to abortion as a fundamental human right* is crucial, as *Roe v Wade* no longer leads and influences liberal reproductive governance among States. This necessitates that States implement a human rights-based approach to abortion, aligning their laws and policies with international human rights standards such as the ICCPR and CEDAW. States should also prioritize the *inclusion of intersectional perspectives in their reproductive health policies and programs*, considering the unique needs and experiences of marginalized groups such as women of color, LGBTQ+ individuals, and those with disabilities.

Secondly, *effective communication between the scientific community and international law is crucial* for harmonizing the right to abortion and protecting it from social, political, and cultural biases. In shaping their abortion laws and policies, legal scholars and policymakers should actively engage with the most recent scientific evidence and medical guidelines, such as the WHO abortion care guideline 2022. This requires establishing channels for ongoing dialogue and collaboration between experts in reproductive health, public health, and law in order to ensure that *laws and policies are evidence-based, routinely updated, and reflective of best practices in abortion care*.

Thirdly, States can be encouraged to adopt a ‘functionalist’ approach and use it to bridge the divide between abortion laws and practice by implementing ‘public health law research’ methodologies. Instead of relying solely on the legality of abortion, Rebouché’s ‘functionalism’ emphasizes the importance of aligning abortion laws with the *practical realities of women’s reproductive health care*. States should conduct *periodic evaluations of the availability, acceptability, accessibility, and quality of abortion care services, using data and evidence* to inform policy decisions and ensure that laws and regulations are in accordance with the changing needs of women and their reproductive healthcare.

Lastly, evidence-based guidelines for safe and comprehensive abortion care covering legal, regulatory, and clinical aspects, such as the 2022 WHO Safe Abortion Guidelines, may give States a reasonable opportunity to ensure equitable access to high-quality abortion care, *standardizing and harmonizing global practices* and safeguarding women’s reproductive rights.

We strongly advocate that *safe and legal abortion facilities may be essential*

in some cases under certain social and economic realities for certain individuals and be made available while securing the increased and higher level of privacy i.e., protecting the identity (maintaining anonymity) of the woman in appropriate cases.

Even though the overturning of *Roe* did not directly negatively impact any abortion framework around the world, it still has every chance to undermine everything *Roe v Wade* created. Moreover, it can also be a tool to strengthen the voices against liberalizing reproductive rights worldwide. In this situation, *the principles established by Roe v Wade must be preserved.*

In conclusion, the preservation of abortion and reproductive rights in a world without *Roe v Wade* requires proactive efforts from multiple stakeholders, including States, legal scholars, policymakers, and scientists. For the protection of abortion and reproductive rights among States, *adopting a human rights-based approach, establishing effective communication between the scientific community and international law, utilizing functionalism to bridge the gap between laws and practice, and promoting evidence-based guidelines such as the WHO abortion care guideline 2022 can serve as guiding lights.* These recommendations can aid in ensuring that women have access to safe, legal, and comprehensive abortion care and that their reproductive rights are respected, protected, and fulfilled in accordance with international human rights standards and public health principles

Explicitly, this article advocates conceptualizing abortion predominantly as a matter of gender equality and bodily autonomy rather than merely privacy or liberty concerns.²³² Drawing upon feminist legal scholarship, notably works by Reva Siegel and Catharine MacKinnon, it emphasizes that reproductive autonomy is fundamental to achieving substantive gender equality, thereby positioning abortion within a broader equality framework rather than restricting it solely to privacy or individual choice.²³³

Moreover, regarding the applicability of international human rights law, the authors recommend that Bangladesh explicitly incorporate international human rights standards, particularly from ICCPR and CEDAW, into its domestic jurisprudence. Though international human rights instruments do not automatically override domestic law without explicit ratification, Bangladesh's judiciary frequently references international human rights norms as persuasive authority in constitutional interpretation and public interest litigation. Thus,

²³² Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' (1993) 24(2) Studies in Family Planning 73, 76.

²³³ Catharine A MacKinnon, 'Privacy v Equality: Beyond Roe v Wade' in MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 93; Reva B Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 Stanford Law Review 261, 264.

adopting international human rights standards explicitly into domestic law would clarify ambiguities surrounding reproductive health rights and empower judicial advocacy challenging restrictive laws through rights-based frameworks.²³⁴

Appendices:

Appendix I: The Questionnaire

Appendix II: The Responses

Appendix III: The Survey Table

²³⁴ Hameeda Hossain and Sara Hossain, 'Reproductive Rights Advocacy in Bangladesh: Challenges and Opportunities' (2018) 12(1) Asian Journal of Comparative Law 23, 27.