Defending the Womb's Choice: A Study of the Politics of Abortion Discourse in USA

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Sanghamitra Baladhikari*

ABSTRACT

Masculinity has long been a site of powerful coercive apparatus in regulating women's reproductive rights. The female body is constantly politicised with major factors such as repression of female sexuality, deliberate exaggeration of morality and most importantly legal restrains have caused women to become the 'Other' or as the French feminist Simone De Beauvoir puts it, the 'second' sex. The rise in the number of bans on abortion laws and abortion laws being made stringent globally is a relevant example which shows the obstacle in the path of reaching the goal of social sustainability. The paper analyses how sexual and reproductive rights with special mention to the abortion laws in the United States of America is vital for a woman's capacity towards physical, social and psychological empowerment, which therefore becomes central towards the women empowerment and social wellbeing. It is imperative, therefore that the government start to prioritize including reproductive rights of women as one of the fundamental agendas in ensuring gender equality globally, which becomes a step towards achieving the United Nations Sustainable Development Goals. The pro-choice and the pro-life debate in the USA is a fundamental challenge in gaining access to women's right to safe abortion rights and this paper discusses it as one of the gaps in access to women's reproductive rights. This reinforces the fact i.e. the lack of easy access to safe measures which becomes one huge hindrance towards women's right to autonomy, liberty and privacy for their inalienable right – sexual and reproductive empowerment. Lastly, the paper discusses the global perspective on various discourses of abortion.

* Ph.D. Research Scholar, St. Xavier's University, Kolkata, Email: misssangho@gmail.com

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DEFINING REPRODUCTIVE RIGHTS

According to the International Conference on Population and Development, Programme of Action -

"Reproductive rights embrace certain human rights that are already recognized in national laws, international laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents."

Reproductive health can be defined as a state of total physical, mental and social wellness. This does not only include the elimination of any infirmity or disease, but also any other functions relating to reproductive health. The advocacy of reproductive health includes men and women's rights to be informed about reproductive health and rights, access to safe and affordable family planning measures and access to safe and legal maternal rights including healthcare services during pregnancy and childbirth.[1] These are considered to be important components of reproductive health care. Under the wide plethora of questions pertaining to the reproductive health, the female body as long been a contested sites of gender politics which further hinders women's reproductive empowerment. The pro-choice and the pro-life debate in the USA is a fundamental challenge in gaining access to women's right to safe abortion rights and this paper discusses it as one of the gaps in access to women's reproductive rights.

The Convention on the Elimination of All Forms of Discrimination against Women makes it an obligation for the state to ensure "access to health care services, including those related to family planning".[2] Secondly, the World Health Organisation promotes components such as ensuring contraceptive choices; improvement of maternal and infant

1 Reproductive Rights are Human Rights – A Handbook for National Human Rights Institutions (United Nations Human Rights and The Danish Institute for Human Rights, 2014).

2 Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180 of 18 December 1979, (Nov. 17, 2021, 10.05 PM) https://www.ohchr.org/documents/professionalinterest/cedaw.pdf

health; elimination or reducing reproductive health morbidities; elimination of unsafe abortion practices and promoting post-abortion care and development of adolescent health and promotion of healthy sexuality. Despite several international instruments addressing the issue of reproductive rights, women's access to these rights has been scrutinised.

ABORTION LAWS IN USA AND THE ROLE OF LEGISLATURE.

The legislature is one of the most significant tools of in the society which enhances the capacities and rights of the citizens. The legislative branch involves elected members by the people and it operates under the arena of transparency and accountability that puts forward people's right to justice.[3] One of the primary roles of the judiciary is to advance the rights and opportunities of people, especially the vulnerable sections of the society. However, some of the legislations proposed in the United States of America has necessarily affected women's reproductive rights.[4] Government imposed barriers or U.S. laws and policies often prohibit the access to contraception, abortion and other forms of health care. 2019 has often considered as the year in which Roe fell. Roe v. Wade is the landmark judgement delivered by the Supreme Court of the United States of America in the year 1973. The judgement advanced women's right to safe abortion as a constitutional right. However, the judgement has been under constant attack since. Over 450 restrictive abortion laws have been enacted by the states in the last decade and in 2019 US have implemented coercive and unconstitutional bans on access to abortion.[5]

Theoretical Findings of Stringent Abortion Laws in USA.

a. STATE OF ALABAMA

The state of Alabama restricts the access to abortion at twenty weeks and in the year 2019 the state imposed absolute ban on abortion. Along with this, funding for post abortion health care, private insurance covering abortion. TRAP or Targeted Regulation of Abortion Providers laws imposes restrictions for providing abortion care to licensed medical practitioners and people who are reported against or violates the terms, face criminal penalties. The state does not guarantee protections for abortion and rather declares that the "state acknowledges, declares, and affirms that it is the public policy of this state to recognize

3 FROM RIGHTS TO REALITY: HOW TO ADVOCATE FOR WOMEN'S REPRODUCTIVE FREEDOM (CENTRE FOR REPRODUCTIVE RIGHTS, 2003).

4 JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA*,* 56 (2009).

5 Centre for Reproductive Rights, What if Roe Fell 2019 (2019).

and support the sanctity of unborn life and the rights of unborn children, including the right to life", generated from the pro-life discourse in America.[6]

b. STATE OF ARIZONA

The Arizona law restricts abortion at 20 weeks apart from stopping public funding for abortion. As the state of Alabama, Arizona too criminalizes who tries to manage their abortion themselves. The TRAP or Targeted Regulation of Abortion Providers laws as applicable in the state of Alabama, is applicable in Arizona too. The state of Arizona does not advance any form of protection for abortion by the Constitution or any statutes.

c. STATE OF ARKANSAS

The laws in the state of Arkansas prohibits the access to abortion at 20 weeks. In 2012, the state of Arizona enacted a total 18 weeks ban on abortion. Apart from this, the state also does not allow pregnant women to seek abortion if the reason behind the abortion is the detection of Down syndrome in the foetus. Arkansas too stops public funding and insurance coverage for abortion. Targeted Regulation of Abortion Providers laws in include the requirements related to facilities, admitting privileges agreements and reporting. The state of Arkansas does not advance any form of protection for abortion by the Constitution or any statutes. However, by the 68th Amendment in the Arkansas Constitution, it is stated that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."

d. DISTRICT OF COLUMBIA

Limitations has been imposed on the public funding for abortion by the federal government of the District of Columbia. Apart from this, nurses and midwives who are legally certified, are not allowed to provide abortion by surgery by the laws of the District of Columbia. The Constitution of the District of Columbia does not protect the rights of abortion.

e. STATE OF COLORADO

Limitations has been imposed on the public funding for abortion by the laws of Colorado. The law also states that abortion providers must report to the state and for the reimbursement for abortion from the public funding, it must be provided by a licensed physician. Civil penalties are faced by anyone who goes against the laws. The laws in

6 *id.* at 28.

Colorado does not protect the rights of abortion.

f. STATE OF MISSISSIPPI

The state of Mississippi is an example of a state which has undertaken very restrictive, coercive and unconstitutional legal means regarding access to abortion. The laws of Mississippi abortion are illegal after 15 weeks of pregnancy. This is a challenge to the 1973 Roe vs Wade judgement delivered by the Supreme Court of the United States of America because 15 weeks abortion ban is almost two earlier than what the Roe vs Wade judgement allows. Despite the fact that many medical experts have suggested the fact that the viability of the foetus can be estimated to be twenty-four weeks, abortion is still banned before that time period on the terms of the foetal viability. It was addressed by the State that significant physiological developments are seen in the foetus by the 15th week. The Jackson Women's Health Organization in Mississippi provided legal evidence to the federal appeals court that it is impossible where foetal viability is concerned at fifteen weeks.[7]

Analysis of the Findings

In the words of Betty Friedan, addressed at the conference of National Association for the Repeal of Abortion Laws, she approached abortion rights as a 'civil right', stating- "The right of woman to control her reproductive process must be established as a basic, inalienable civil right, not to be denied or abridged by the state. What right has any man to say to any woman-you must bear this child? What right has any state to say? This is a woman's right, not a technical question needing the sanction of the state, or to be debated in terms of technicalities-they are all irrelevant."

The Supreme Court of United States, since 1973, has recognised that it is women's constitutional right to have a choice on the subject of abortion. In many occasions, the U.S. government has intervened in the cases of abortion since the early 1980s, before the Supreme Court to argue the landmark Supreme Court decision *Roe v. Wade* that prohibited states from banning abortion, must be overruled. It can be stated that the states world has the authority to ban abortion unless the state's constitution does not allow it, if the Roe v. Wade judgement is eventually overruled by the Supreme Court. And it has happened so especially in the year 2019 after the presidential elections. There have been ballot initiatives to even amend state's constitutions and as a result of which, pro-choice has become far from reality. One of such examples is the state of Alabama, which has politicised the female choice and consequently

7 Adeel Hassan, *What to know about the Mississippi Abortion Law Challenging Roe v. Wade*, THE NEW YORK TIMES, Oct. 28,2021.

stigmatised women's position in the choice of abortion.

Before elucidating on the details of the Alabama State Abortion Policy Amendment, Amendment 2, it is important to address the issue of right to life or pro-life ideology based upon which the legislations are used to ban abortion. The legal enactments across the states in United States of America is based on the right to life and protection of life of the unborn as stated in the above findings. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) adopted in the year 1966, a civil rights treaty, states the right to life of every human being. The Covenant states that –

"Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life. Law shall protect this right. No one shall be arbitrarily deprived of his life."

Interpreting the Article, it can be explained that here the word "human being" is open to a series of interpretations unlike the word 'person' which has been stated in the Covenant under other issues. The word 'person' could eliminate an 'unborn' out of the protection of law but when it comes to the word 'human being' it becomes an umbrella term for a living organism whether or not its born or unborn. Herein becomes the initiation of the debate between right to life, the interpretation of the born and the unborn and the authorization of the woman's right to their own bodies, which unfortunately becomes an issue for the State to decide. Ironically anti-abortion laws are based upon the fact that 'everyone has the right to live'. But it supremely negates the idea of a woman's right to life. It thus puts forward a plethora of questions. This not only creates a psychological impact but also raises a significant question i.e. how far legislations will be used for politicising women's body. Women's body has become a site of moral and political discourse.[8]

The Alabama State Abortion Policy Amendment

International instruments have recognised that women's reproductive empowerment is a key tool for global development. Ballot initiatives are used outside of legislations which allows citizens to involve themselves in democratic process for the purpose of creating legislations or support amendments to already established state constitution. Ballot initiatives are based on the protection of right to abortion as well as opposition to right to abortion. This reflects the impact of pro-life and pro-choice ideology in USA. For instance, through the ballot initiatives conducted in Washington and Nevada, has guaranteed access to abortion.

8 ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE: A COMPARATIVE STUDY OF STATE FEMINISM (Dorothy McBride Stetson ed., 2003).

On the other hand, in many instances, the pro-life opponent has also been able to limit or strip the right to abortion in many states. As per the report published by Centre for Reproductive Rights, ballot initiatives were conducted in the states of Alabama, Oregon and West Virginia in the year 2018 for voting *for* or *against* an amendment with the intention of limiting the right to abortion.[9]

The Alabama State Abortion Policy Amendment, Amendment 2 was a part of the ballot initiative in the year 2018. The voting took place on 6th of November, 2021.[10] The results of the election supported the policy by 59.01% votes. Amendment 2 amended the state constitution in order to do the following:

"(a) declare that the state's policy is to recognize and support 'the sanctity of unborn life and the rights of unborn children, including the right to life',

(b) 'ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate,' and

(c) state that 'nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion'."

As a result of this ballot, the aftermath of this critically affected women's reproductive empowerment. On May 15, 2019, a bill was signed and it became a law which prohibits all abortions in the state "except those necessary to prevent a serious health risk to the woman". It also made an exception for any "act to terminate the pregnancy of a woman when the unborn child has a lethal anomaly." The *Human Life Protection Act or* House Bill 314 stated that it is a felony to perform abortion and the punishment could be up to 99 years of prison for doctors or any agencies trying to perform abortion.

Alliance for a Pro-Life Alabama led the campaign in support of Amendment. Some of the organizations under the pro-life campaign includes the "Alabama Citizens' Action Program (ALCAP), Alabama Policy Institute, Alabama Pro-Life Coalition, Alabama Pro-Life Education Fund, Choose Life, Inc., Cameron's Choice, Eagle Forum, Southeast Law Institute." These organisations were opposed by organisations such as Alabama for Healthy Families led the campaign in opposition to Amendment which supported women's empowerment and tried to de-politicise with pro-choice arguments.

9 *supra* note 5.

10 Alabama Amendment 2, State Abortion Policy Amendment (2018), BALLOTPEDIA (Nov. 18, 2021, 7.05 PM) https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendment_(2018).

IMPACT OF POLITICISING ABORTION LAWS UPON WOMEN'S HEALTH IN USA

Abortion is one of the most controversial issues of discussion in terms of abortion rights, medical ethics in abortion and social and cultural stigma attached to it. Abortion can be identified as one of those aspects in medicine which has been shaped and reshaped into a question of morality by social and cultural factors. The whole debate of whether abortion is a right or that it should be banned giving rise to series of questions. Banning of abortion rights in these states has been perceived as unconstitutional, extreme and dangerous. It can be concluded that abortion ban only supplements the already prevailing goal of controlling female bodies and regulating them according to religious and moral norms or strictures as is prevalent among the pro-life concepts in USA. When we explore the medical or the biological meaning of abortion, it tells us that "an abortion is the removal or expulsion of an embryo or foetus from the uterus, resulting in its death. This can occur spontaneously as a miscarriage, or be artificially induced through chemical, surgical or other means".[11] Abortion brings out a debatable discourse whereby people tend to turn to the law when trying to decide what is the best possible solution to an unwanted pregnancy and explores ideologies such as the 'Antagonistic relationship' between the woman and her unborn child that may occur. Whether the foetus is a human being and the aborting the foetus becomes a question of murder by the mother or that it is a basic human right[12] which gives women a control over their bodies, sexuality, fertility and reproductive power culminates into the issue i.e. the politicisation of a medical procedure in terms of religion, morality, ethicality or medically by hegemonic power.

Policies that aim to ban abortion outright for various reasons have a detrimental impact on the ability of women to access the care they need. Each year, it is estimated that more than 4,000 U.S. women are denied an abortion because of gestational limits, forcing them to carry unwanted pregnancies to term. Restrictions that dictate gestational limits, such as twenty-week bans, can force those facing medical complications to wait until conditions become life threatening to receive care, placing a woman's health and life at severe risk.[13] In other cases, research shows that being denied an abortion because of gestational limits increases a woman's chance of remaining tethered to an abusive relationship.[14] While it may

11 Alka B Patil, Pranil Dode and Amruta Ahirrao, *Medical Ethics in Abortion* 25 IJCP 544 (2014).

12 Bhavish Gupta, Meenu Gupta, *The Socio-cultural Aspect of Abortion in India: Law, Ethics and Practise* Winter Issue ILI Law Rev. 140 (2016).

13 RESTORING OUR RIGHTS: THE WOMEN'S HEALTH PROTECTION ACT (CENTER FOR REPRODUCTIVE RIGHTS, 2017).

14 WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: A SHADOW REPORT (CENTER

only be a small number of women who face these kinds of unconstitutional gestational limits (less than 2% of abortions in the United States occur after twenty weeks), for each and every one of them, the ability to make these personal and private decisions without the meddling of politicians is essential.[15]

A pertinent question arises that whether making safe abortions illegal has reduced the number of abortions at all or not. Before abortion was legal and safe, illegal abortions caused at least one in six pregnancy-related deaths. When abortion was made illegal in countries or when right to abortion was not initiated, it resulted in self-imposed or back street abortions and it thereby leads to self-harm, trauma, abuse and exploitation, infertility and infection and above all often death.

Often, anti-abortion laws are justified in terms of morality. However, the impact of this justification is extreme on women's bodies because the consequence of self-imposed abortions cannot be condoned on the grounds of ethics and morality. It should be understood that if abortion becomes illegal, women are going to prescribe to harmful means which would be physically and psychologically harmful to them. The State's legal methods to stop the access to abortion would indirectly mean to stop access to safe and medically prescribed abortions. The backstreet, dark, disturbing, damaging, self-destructive and traumatic abortions will be there which are performed by the unprofessional. Therefore, this will affect not only a significant degeneration of women's health, but also an overall lack of growth in the country's health standards.

The impact of bans and limitations on the access to abortion does not only affects women's physical self but also impacts their psychological health. Stigmatisation in abortion is deeply individualistic and social process with is attached to the idea of a person violating the social norms that are expected of them. A survey in United Nations tried to analyse the emotions that are a woman undergoes after she undergoes an abortion. This gives rise to the question of what is the degree of extreme forms of stigmatisation faced by women.[16] How does the constant suppression of the fact that they have undergone an abortion makes them drive into psychological trauma? Many women have complained in an anonymous survey that they were likely to experience PTST (Post Traumatic Stress Disorder) more so because they were anticipating about how the society or even the doctor in charge would respond to

FOR REPRODUCTIVE RIGHTS, 2006).

15 ABORTION LAW AND POLITICS TODAY (ELLIE LEE ed., 1998)

16 Muhammad Asif Wazir and Khadija Shaheen, *Understanding and measuring pre and post abortion stigma about women who have abortions: Results from explorative study* (2015) (Nov. 16, 2021) https://paa.confex.com/paa/2016/mediafile/ExtendedAbstract/Paper3246/Extended%20abstract%20PAA%202016.pdf

them seeking abortion.

The moral and religious debate about the legislations related to the termination of unwanted pregnancies has been continuing for years now, not just in the United States of America but all over the world. For example, in India, despite the moral and judicial debate and discourse around termination of pregnancies, it continues to give abortion rights up to 20 weeks of pregnancy. In the recent development in the abortion laws in India, The Medical Termination of Pregnancy (Amendment) Bill was introduced in the year 2020 and became an Act in 2021, which "amends the Act to increase the upper limit for termination from 20 to 24 weeks for certain categories of women".[17] Advocates of women's rights are still in the process of fighting the moral and religious debates in India. It is a notion that termination of pregnancy is unethical, base and corrupt but on a higher order of thinking, it is a right that cannot be taken away from women. The question still persists whether women are getting their due rights to a safe and judgement free abortion. In this context, abortion rights must be recognised not only a right that women can exercise over their bodies but also a right to their own life and as a human right,[18] over anything that is yet to be born or the *unborn*? To force a woman to bear unwanted pregnancies as a result of stringent laws is a form of moral tyranny.

RECOMMENDATIONS FOR DEPOLITICISING THE FEMALE BODY.

Reproductive justice is an inherent right that must be achieved regardless of their race, colour, nationality, sex, age. It seeks to address the limitations imposed on reproductive health. The severe impact of the legislations is huge upon women's bodies and health and it is the need of the hour to depoliticise their bodies. As much as legal methods are used to restrict women's access to abortion in the United States of America, the role of legislature still exists in protecting the rights of women and advance women's reproductive empowerment. In the Senate of the United States, on 27th of September 2021, the Women's Health Protection Act of 2021 was received. The main focus of the Act was stated as "to protect a person's ability to determine whether to continue or end a pregnancy, and to protect a health care provider's ability to provide abortion services".[19]

Some of the major findings in reference to this Act is significant for protecting women's right to abortion. It was found that "Abortion services are essential to health care and access to those services is central to people's ability to participate equally in the economic

17 The Medical Termination of Pregnancy (Amendment) Act, 2021, No. 8 of 2021, 2021 (India).

18 Veena Johari and Uma Jadhav, *Abortion rights judgement: a ray of hope!* 2 Indian J Med Ethics 180 (2017)

19 H.R. 3755 (EH) - Women's Health Protection Act of 2021, 2021 (United States)

and social life of the United States. Abortion access allows people who are pregnant to make their own decisions about their pregnancies, their families, and their lives". As a legislative response by the federal government to the restrictions imposed on the abortion laws of the United States of America, the Women's Health Protection Act ensures access to safe and legal abortion and it further invalidates laws that "single out abortion providers with medically unnecessary requirements and restrictions", "do not promote women's health or safety" and "limit access to abortion services". These laws become the crux of the problem where women's decision making power is shamed. The significance of this Bill, which if enacted and becomes an Act, would "simplify litigation to block these kinds of measures across the country, improving abortion access for women no matter where they live".[20]

According to The Women's Health Protection Act, the states will be restricted to impose some of the following restricts on abortion laws.

a. Unnecessary requirement of medical tests and procedures that would delay the process of abortion.

b. Same type of clinic personnel performing all the services related to abortion. It is important that highly qualified medical personnel must also recognise the need to be a part of the service as the patient requires as much care and attention as any other person going through a treatment.

c. TRAP or Targeted Regulation of Abortion Providers Laws restrictions.

d. Requirement of women to visit the abortion facility more than once for medical reasons.

e. Prohibition on training for abortion providers.

f. Prohibition of abortion before viability.

g. Ban on abortion post-viability with special focus on ones which "do not make exceptions for women's life or health.

h. Any kind of delay in receiving abortion care which would become a health risk for the women concerned.

i. Any kind of bans which is based on women's individual choice to end her pregnancy. For example, banning abortion on the basis of women of colour and race

20 *id*

are unconstitutional in nature. Some bans which are related to abortion carry the intention of shaming women to rethink their decision and force them to change their decision as a result of constant moral policing.

The President of NARAL Pro-Choice America Iiyse Hogue, stated that The Women's Health Protection Act is a legislative means which will focus on empowering women and it is a weapon against a bad policy and a tool towards proposing good legislation which aims at protecting and expanding women's freedom of choice. Therefore, this Act in the future may become significant in de-politicising women's bodies to a great extent. A federal solution of such stature is significant to fight the discrimination that women face on the basis of protecting the pro-life discourse prevalent in the United States of America.

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