Opinion – The Right to Access Abortion is a Right to Privacy

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The United States (US) was influential in drafting the UN Convention on the Elimination of Discrimination against Women (CEDAW) 1979. The US was the first State to sign the CEDAW in July 1980, but it has not ratified it. Other States not parties to the CEDAW, include Iran, Palau, Somalia, Sudan, and Tonga. CEDAW is the most ratified (189 countries) human rights convention in the world, and it is regarded as the Holy Bible of Women's human rights, including their sexual and reproductive rights. UN Women's Rights Committee exhorted the US to abide by the CEDAW in the wake of the US Supreme Court decision to bring down the pillar of Gender Constitutionalism duly evolved and enlarged in Roe v. Wade 410 US 113 (1973) and expressed solidarity with women and girls in the US. The Committee also demanded the decriminalisation of abortion. It advocated for legal abortion in situations of incest, rape, foetal deformity, and credible risks such as the threat to life or health of pregnant women and girls. Nevertheless, the US Supreme Court has failed to appreciate that everything cannot be written in the Constitution as constitutional conventions, principles, values, and ethos are the products of interpretation of the Fourteenth Amendment that envisioned equality for all US citizens and beyond.

The right to access abortion is a constitutional right stemming from gender constitutionalism engrafted in*Roe v. Wade,* but unfortunately, in Dobbs v. Jackson Women's Health Organization, the US Supreme Court, on 22 June 2022, blatantly dismantled the well-entrenched nuanced understanding of the Gender Constitutionalism on the primordial grounds that the substantive fundamental right to access abortion was not the part of American civilisation and it does not qualify to be a right *per se* until the Roe v. Wade. The impugned devastating decision is destined to affect generations to come, and the US Supreme Court will be recorded in history as the snatcher of this fundamental right. The US Supreme Court has departed from the dynamic interpretation of equality and radically killed the fundamental understanding of the Fourteenth Amendment and the Fifteenth Amendment incorporating equal protection clauses that command the US government to treat men and women equally in terms of dignity, status, opportunities, rights, and responsibilities.

These Amendments direct the US and its States not to "deny to any person within its jurisdiction the equal protection of the laws." Therefore, the US Supreme Court recognised equal protection as a constitutional guarantee in Minor v. Happersett, applying to women as persons. Gender constitutionalism is an evolutionary journey of dynamic perfection that creates the right to ceaseless commitment to upholding the universality, indivisibility, and interdependence of human rights and democratic values that provided an opportunity to the US Supreme Court to reposition gender justice if it could not do so fifty years ago, in *Roe v. Wade* for the women and girls worldwide. It has missed a historical opportunity to unequivocally reiterate gender constitutionalism with the global lens to respond to the gap in rights for the global common good as gender constitutionalism is not sufficiently and appropriately international in representation.

The right to access abortion is not only a human right but also a question of constitutionally ordained equality, including the right to privacy. Unfortunately, the constitution-making around the world has been prodigiously in the hands of men that have failed the idea of equal citizenship status for women. In an age of LGBTQI+ rights, where same-sex marriages in many developing jurisdictions and trans persons' rights in the Global South have challenged the constitutional gender order (CGO). The US Supreme Court has miserably failed to consider an all-inclusive

feminist understanding framework of American constitutional law. The right to access abortion is private individual conduct generating the right to privacy and does not invoke state action *per se*. If individual conduct is private, the state action cannot successfully invoke Section 1 of the Fourteenth Amendment that encapsulates "all persons," protection of "privileges or immunities of the US citizens" and command the US and its constituent states to protect all persons and their "life, liberty, or property," following the "due process of law" and ensure to all within its jurisdiction "the equal protection of the laws," or most other provisions of the US Federal Constitution as the Constitution generally protects against public violations, not private ones.

The doctrine of state action limits the enjoyment of constitutional rights and the international human rights law (IHRL) framework, including the right to privacy. However, all constitutional rights envisioned inherent limitations for their enjoyment and affordability. Therefore, the right to privacy may also be invoked to limit the state action consistent with gender constitutionalism protecting privacy from state interference. The right to privacy is the foundation for the fundamental modern liberty of abortion. It is the right to a privacy framework that can ensure gender equality in the US and elsewhere because the US depends upon the constitutional right to privacy instead of equal rights of women for abortion, contraception, and interracial and same-sex marriages. In the case of Eisenstadt v. Baird, 405 US 438 (1972), Court ruled that the Fourteenth Amendment provides liberty to unmarried couples to use contraception as their constitutional right to privacy. In spite of the disapproval, US Supreme Court reaffirmed Roe's "central ruling" in its 1992 decision, Planned Parenthood v. Casey, 505 US 833 (1992), and prohibited the State action of banning abortions. The Court also ruled that the US states "may" regulate abortions but for protecting the health and life of the mother and the foetus, respectively.

The US Supreme Court's regressive re-writing of the history of gender equality and women's human rights is not genuinely a constitutional decision. It sounds more like a far-right judicial narrative, a revanchist ideological saga, and a parochial re-statement of the return of patriarchy and all in the garb of judicial sanctity. The instant decision reminded the world about the US Supreme Court's racist and oppressive decision in the case of Dred Scott v. Sandford (1887) in which the Court ruled against the mandate of the Fourteenth Amendment that African Americans, whether they were enslaved or free, were not recognised as citizens of the US. The Court also ruled that the Constitution of the US is a pro-slavery constitution without specifying any constitutional provision to prove their preposterous argument that ultimately resulted in Civil War. Similarly, on 22 June 2022, the US Supreme Court committed the same blooper by advancing a fallacious argument that the US Constitution does not provide the right to access abortion under the constitutional hermeneutics of the Fourteenth Amendment. Therefore, the US Constitution is neither pro-abortion nor anti-abortion, it is fundamentally pro-gender equality and non-discriminatory for the "*We, the People*," including women and girls, and fosters their rights and self-determination of their reproductive rights.

The US Supreme Court decision in the Dobbs case has the propensity for delegitimising the mandate of ongoing feminist movements worldwide, weakening the fostering of the rights of women as human rights and emasculating the ceaseless commitment to upholding the universality, indivisibility, and interdependence of human rights and democratic values for women. Ruling in the Dobbs decision will pave the way for the disempowerment of women in many jurisdictions across the world. It is bound to re-ignite the patriarchal significance in Global South jurisdictions providing legitimacy to sex determination in many countries in the Global South. Thus, the US Supreme Court's decision will obliterate fifty years of gender and reproductive rights accomplishments. The current catastrophe of reproductive rights self-determination turned out to be a stumbling block to a wide range of fundamental rights and human freedoms built upon the dynamic constitutionalism progressing along with liberal democracy of judicial remedies flagrantly denied in Dobbs v. Jackson Women's Health Organization with far-reaching consequences to re-emergence of the feminist discourse on abortion rights. In the US, the right to privacy has been a luxury available to few.

It is aptly evident from the US Constitution that it has impacted constitution-making worldwide and shaped and inspired many countries with its constitutional conventions and values. The US Constitution is wedded with equality, non-discrimination, due process of law, and judicial review, providing enough space for dynamic interpretation. It has the internal ability to respond to the current constitutional crisis generated in the Dobbs. The judges in the US Supreme Court need to decolonise gender and judicial scholarship and make it global. The Dobbs decision has

vertically and horizontally truncated the civil societies and stakeholders globally on gender lines. The international constitutional scholarship arguing the restoration of the *Roe v. Wade* gender constitutionalism and guaranteeing the right to access abortion as a right to privacy should have been the US Supreme Court's sole purpose under the Constitution's equality clause. The judges could have been the Prophets of Gender Constitutionalism in the first quarter of the 21st century by strengthening the structural justice framework through their common push and transforming the society from inequality, vulnerability, and reproductive injustice.

To make sustainable gender constitutionalism succeed, a judge must abdicate his/her wish to take advantage of the so-called golden silences, spaces, or gaps in the constitutional provisions for transplanting their ideological choices and voices in those gaps subsequently; morphed into judicial reasoning that are reflected in their judgments.

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