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**A Study on Judicial Trends in Right of Abortion in United States of America**

**K Kirthan Shenoy**

## ABSTRACT

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*The right to terminate pregnancy has been centre of debate in both the American and Indian public law sphere. The question always oscillated between the right of choice of pregnant women and right of unborn child. The pro-choice group have an opinion that the women have sole right and liberty to decide upon whether she wishes to undergo pregnancy and if not she has the sole right to terminate the pregnancy opt for abortion. The pro-life group work with belief structure that the unborn child has equal right to live and the pregnant women does not have unilateral right to terminate pregnancy as the child has rights of his own and leads to violation of his right to life. The legislature and statutes around the world have seen various phases from being restrictive abortion laws to regulated laws which provided choice to women to terminate the pregnancy within certain time with certain reasonable condition. All such laws have been constantly challenged by both the above groups which has given prominence to courts which has laid down the appropriate jurisprudence from time to time. The courts in United States of America And India have actively opined on the matters as and when matters have been brought before it. The Supreme Court of United states of America recently admitted the matter to decide upon the Louisiana law imposes restrictions that abortion providers have said would force them to close. It requires that doctors who perform abortions have a difficult-to-obtain arrangement called admitting privileges at a hospital within 30 miles (48 km) of the clinic. The legal issue is similar to the 2016 case of Whole Woman's Health v. Hellerstedt. Considering the above developments, it is important to look at the judicial approach taken by the courts so as to understand the present settled principles and possible changes which may arise in future.*

## JUDICIAL APPROACH IN UNITED STATES OF AMERICA

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In *Roe vs Wade's* case, the court ruled that states may not categorically ban abortions by making their execution a felony, and that states may not make it overly difficult to obtain abortions through imposing extensive procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that a woman's decision whether to carry a pregnancy to term was embraced by the Fourteenth Amendment right of personal privacy. With regard to the extent of that right to privacy, the Court stated that it included only personal rights which could be considered to be essential or implied in the principle of ordered liberty and that it included some extension of activities relating to marriage, procreation, contraception, family relationship, child rearing, and education. Such a right, the Court ruled, is sufficiently broad to cover a woman's decision to terminate her pregnancy. As regards protecting the right from state interference, the Court held that since the right to personal privacy is a fundamental right, only a compelling State interest could justify a state's restriction. Therefore, while it recognized the State external legitimacy. Therefore, while acknowledging the importance of the state interest in protecting maternal health and preserving the potential life of the fetus, as well as the existence of a reasonable link between those two interests and the anti-abortion law of a state, the Court held that these interests were insufficient to warrant an absolute prohibition of abortions. Instead, the Court emphasized the longevity of pregnancy and held that the interests of the state were sufficiently compelling to require abortion to be curtailed or banned only during certain stages of pregnancy<sup>1</sup>.

Moreover, In *Doe v. Bolton*, the Court expanded *Roe's* decision by advising that just as states cannot prohibit abortion by making their operation a felony, by imposing complex procedural obstacles they may not make abortions unreasonably difficult to obtain. In *Doe's* case, the Court struck down Georgia's conditions for abortions to be carried out in licensed hospitals; for abortions to be approved by a hospital committee beforehand; and for two doctors to consent to abortion decision.<sup>2</sup>

Then in the case of *Akron city v. Akron centre for reproductive health* The Court invalidated informed consent provisions that included details on the medical risks of abortion, fetal development, abortion alternatives, and a 24-hour waiting period. The provisions relating to parental consent without judicial override, a provision allowing abortions to be performed

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<sup>1</sup> 410 U.S. 113, 123 (1973).

<sup>2</sup> 410 U.S. 179 (1973)



only in hospitals after the first trimester and one requiring that fetal remains be disposed of in a humane and sanitary manner<sup>3</sup> were also invalidated.

The Court upheld Missouri's limits on the use of public employees and services for performing abortions in *Webster v. Reproductive Health Services*. While *Roe* was not overruled by the Court, a majority of judges showed that it was willing to apply a less strict oversight requirement to state abortion laws. The ruling also challenged the definition of viability by *Roe's* judgment as the point at which a state could control abortion. *Webster* noted that state legislatures maintain significant flexibility in passing abortion laws, and accepted the possibility that such legislation would possibly pass constitutional trend in the future.<sup>4</sup>

In the case of *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, the judges adopted a new definition of undue burden, maintaining that this principle acknowledged the need to balance the interest of the government in potential life with the right of a woman to decide to terminate her pregnancies. Although *Roe* generally restricted the first trimester regulation of abortion, *Casey* emphasized that not all the restrictions imposed by an abortion regulation were likely to be undue. Nonetheless, by implementing the new undue burden principle, *Casey* reaffirmed *Roe's* fundamental holding which was defined by the majority as having three sections. First, a woman has the right to choose an abortion before viability without unreasonable State interference. Second, the State has legitimate interests in preserving the woman's health and the fetus' life from the onset of pregnancy. Third, the state has the right to ban after-life abortions as long as the law includes an exception for pregnancies that put a woman's life or health at risk. Furthermore, it was found that the inclusion of a 24-hour waiting period clause, its informed consent provision, its provision of parental consent and its record keeping and reporting provisions did not impose an undue burden. The spousal notification clause of the law, which mandated a married woman to announce her intention to have an abortion to her husband, did not survive the undue burden analysis.<sup>5</sup>

In *Stenberg vs. Cahart*, the Court held that a Nebraska statute banning the performance of so-called partial-birth abortions was unconstitutional because it failed to include an exception to protect the mother's health and because the language defining the banned procedure was too

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<sup>3</sup> 462 U.S. 416 (1983)

<sup>4</sup> 492 U.S. 490 (1989)

<sup>5</sup> 505 U.S. 833 (1992)

vague. In affirming U.S. decision *The Court of Appeals for the Eighth Circuit* concluded that the language of the Nebraska law could be interpreted as banning not only the procedure of dilation and expulsion (D&X) which prolife advocates reject, but the standard procedure of dilation and evacuation (D&E) which is the most common abortion procedure during the second trimester of pregnancy. The Court held that, due to fear of punishment and imprisonment, the law was likely to cause those who perform the D&E process to stop. The effect would be an undue burden on the ability of a woman to possess an abortion.<sup>6</sup>

The legislation, called the 2003 Partial-Birth Abortion Ban Act, was then passed. The Act forbids doctors from performing a partial-birth abortion except where it is appropriate to save the life of a mother whose health is threatened by a physical disorder, physical illness or physical injury, including a life-threatening physical condition induced or resulting from pregnancy itself. Doctors who breach the act are subject to a fine, imprisonment for up to two years, or both. Despite the fact that the Court held in *Stenberg* and previous decisions concluded that restrictions on abortion would require the procedure to be carried out when it is necessary to protect the mother's health; that exception is not included in the Partial-Birth Abortion Ban Act of 2003.

The Court separated the federal statute in *Stenberg* case from the Nebraska law at issue in the case of *Gonzales v. Carhart*. The federal statute, according to the Court, is not unconstitutionally vague, as it allows physicians a fair opportunity to know what conduct is forbidden. Unlike Nebraska law, which prohibited the delivery of a "substantial portion" of the fetus, the federal statute contains "anatomical landmarks" which define when an abortion proceeding is subject to the prohibitions of the act. The Court noted that if an abortion procedure does not require carrying a living fetus to one of these 'anatomical landmarks'—where either the fetal head or the fetal trunk past the navel is outside the mother's body depending on the presentation—the limitations of the Act do not apply. The court depended on the ability of the government to limit abortions once the fetus reaches viability, as well as on the interest of the government in the fetus existence. In *Casey's* case, the government's legitimate and significant interest in protecting and fostering fetal life was elucidated, with an emphasis in distinguishing between the possible undue burden on the right of the mother to have abortion and the duty of the State to show its deep respect for the life of the unborn. The main focus of the Court in upholding the PBABA has been on the State's interest in preserving the fetus potential life. In the present case the *Gonzales* dissent was delivered by

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<sup>6</sup> 530 U.S. 914 (2000)

Justice Ginsburg. Justices Stevens, Souter, and Breyer joined in. In describing the Court's decision as troubling, Ginsburg challenged the Court's decision to uphold the law without a healthy person exception.<sup>7</sup>

In the case of *Ayotte v. Planned Parenthood of Northern New England* the New Hampshire statute at issue in *Ayotte* prevented doctors from performing an abortion on a pregnant child or adult for whom a guardian or conservator had been named before 48 hours after at least one parent or guardian had been given a written notice. Under certain specified conditions the notification provision may be waived. On that basis, the United States Court of Appeals for the First Circuit invalidated the whole statute. The First Circuit also argued that the life exception of the act was impermissibly vague and forced doctors to gamble with the lives of their patients by preventing them from carrying out an abortion without notification until they were certain that death was imminent. The court held that the act would only be unconstitutional in medical emergencies, but the Court found that it was a smaller remedy. The Court further established three interrelated principles which informed its remedial approach. Next, the Court does not seek to nullify more of the function of a legislature than is appropriate because a decision of unconstitutionality frustrates the will of the people's elected representatives. Second, the Court restrains itself from rewriting a state law in order to comply with constitutional requirements, even as it seeks to save the law. The Court clarified that its constitutional authority and institutional jurisdiction are limited, recognizing that making distinctions in a murky constitutional context that entail a much more severe invasion of the legislative realm than the Court would take. Thirdly, the touchstone for any remedy decision is legislative intent; in other words, a court cannot use its remedial powers to override the intent of the remedy legislature.<sup>8</sup>

The Court annulled two Texas specifications in *Whole Woman's Health v. Hellerstedt* that introduced to abortion providers and physicians who perform abortions. A physician who conducts or causes a termination under a Texas law passed in 2013 was needed to have privileges admitted to a hospital within 30 miles from the place where the abortion was performed or induced. Admitting privileges generally allows a physician to transfer a patient to a hospital if complications arise during the course of treatment. Texas law has mandated an abortion clinic to meet the same requirements as an outpatient surgical centre (ASC). These requirements tackle technical and other structural issues as well as organizational

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<sup>7</sup> 550 U.S. 124, 147 (2007)

<sup>8</sup> 546 U.S. 320 (2006)

considerations such as staffing and medical records systems. The Court noted the low complication rates for first- and second-trimester abortions, and expert evidence that complications seldom warrant hospitalization during abortion procedure. On the basis of this and specific evidence, the Court contested the state's claim that the motive of the necessity for admitting privileges was to provide easy access to a hospital should complications arise. The Court stressed that there was no significant health-related issue which the new law helped cure. The court was of the opinion that perhaps the provision of ASC placed an undue burden on abortion availability. Noting that the record supports the conclusion that the ASC provision does not favour patients and is not appropriate, the Court also cited the closing of facilities and the cost of fulfilling the requirement as proof that the regulation presented a significant barrier for women seeking abortions. The Court, reframing the Casey test, ruled that if a state regulation put a significant barrier in women's path to pursue pre-viability abortion without providing sufficient medical benefits to justify the requirement, the legislation was inadmissible. Hellerstedt shows the ability of the Court to review closely the rules on abortion in order to determine whether the rights of the States really are served.<sup>9</sup>

## CONCLUSION

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The courts in both the jurisdiction have been proactive till now in recognising the rights of women to terminate the pregnancy. In United States of America after *Planned Parenthood v. Casey* legitimate state interests have been used to justify bans on abortion based on fetal development, women's reasons for obtaining abortions, and the medical procedure used, and restrictions on access to abortion such as targeted regulations of abortion providers, waiting periods, counselling, and ultrasound requirements, parental involvement laws. Further in 2016 in the *Whole Woman's Health v. Hellerstedt* case the Court held that when a state passes an abortion regulation that is justified by the state's legitimate interest in protecting women's health, the degree to which women's health is likely to be protected by the new regulation must be proportionate to the burden on the provision of abortion care created by compliance with the regulation. Thus it can be seen that the states in United States of America have started to pass a wave of regulations on abortion to test the boundaries established under *Roe vs Wade* and the allowance made in *Hellerstedt* case. The present matter of pertaining Louisiana will have to balance a woman's constitutionally protected

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<sup>9</sup> 136 S.Ct. 2292 (2016)

liberty against the state's interest in women's health and the potential life of the unborn fetus and also pass the undue burden standard test.