

PERSPECTIVE

Challenging the US Supreme Court's Majority Ruling on *Roe v. Wade* at the International Human Rights Level

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Abstract

This paper proposes that US human rights experts and abortion rights advocates challenge the striking down of *Roe v. Wade* in June 2022 by the majority of US Supreme Court justices because of the multiple human rights violations it has engendered. The paper has three parts. The first part summarizes the compelling response of the three dissenting Supreme Court justices to the majority ruling, which spells out those violations in detail. The second part offers a history of cases of violations of human rights related to abortion in other countries that have been heard and adjudicated by a range of human rights bodies in the last 20 years, and their outcomes. It shows that working on these cases has created working relationships between national and international human rights experts and advocates. Based on this information, the third part proposes that US human rights and abortion rights advocates take a case to the Inter-American Commission on Human Rights against the US Supreme Court ruling, asking the commission to direct the US government to void the majority ruling on *Roe v. Wade*—on the grounds that it violates the human rights of anyone who seeks an abortion and potentially also of those whose wanted pregnancies become a risk to their health and life and need to be terminated. And if the United States does not agree, the commission should refer the case to the Inter-American Court of Human Rights.

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Part I: The US Supreme Court's majority ruling in *Roe v. Wade* violates many human rights

Human rights are rights we have simply because we exist as human beings—they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.¹

The following are defined as freedoms or rights in one or more of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights:

- right to life
- right to health
- right to equality and nondiscrimination
- right to liberty and security of the person
- right to equality before the law
- right to benefit from scientific progress
- freedom from torture
- freedom from slavery.²

Human rights are embodied in international human rights treaties that can be ratified by states or are part of political declarations. They are also recognized in the laws of individual countries, and part of national policies and laws. States that have ratified international human rights treaties must comply with and respect, protect, and fulfill these human rights. Each of these rights is relevant in order to be able to access safe abortion.

The United States has ratified only the Convention against Torture, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and two optional protocols on armed conflict and sale of children, prostitution, and child pornography to the Convention on the Rights of the Child.³ The list it has not ratified is much longer.

The United States Constitution's Bill of Rights was ratified in 1791. The 14th Amendment to the US

Constitution is about equal protection under the law for all citizens. The right to nondiscrimination on the ground of sex is relevant to women's human rights as related to abortion access, even though abortion was not mentioned when this amendment was added to the Constitution in the mid-19th century. In 1973, the US Supreme Court ruled in *Roe v. Wade* that state criminalization of abortion was unconstitutional. But on June 24, 2022, the US Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*, which opened the way for states to again criminalize or restrict abortion. The majority of the Supreme Court justices, who opposed *Roe v. Wade*, argued that because the 14th Amendment did not include a constitutional right to abortion, such a right was not sufficiently embedded in US history to justify retaining it.⁴

In early 2023, however, during a criminal case against several anti-abortion activists, US District Court Judge Colleen Kollar-Kotelly of Washington, DC, argued that the lack of mention of abortion in the 14th Amendment did not rule out *other* relevant amendments in the US Constitution that might apply instead, and pointed to the 13th Amendment as a relevant example.⁵ The 13th Amendment made involuntary servitude and slavery illegal. As it is everyone's right to determine what to do with their own bodies and lives, she considered that forced pregnancy and its outcome, forced motherhood, leading to the birth of an unwanted child, should surely be considered a form of involuntary servitude imposed on girls and women, with potentially lifelong consequences. Unfortunately, this point had not been discussed by the Supreme Court justices in June 2022. But the three dissenting Supreme Court justices provided 66 pages of equally compelling reasons why they rejected the majority opinion.

The dissenting arguments of Justices Breyer, Sotomayor, and Kagan

While the majority judgment drafted by Justice Samuel Alito became front-page news in the United States after it was leaked on May 2, 2022, the cogent 66-page statement of dissent by Justices Stephen

Breyer (since retired), Sonia Sotomayor, and Elena Kagan, published on June 24, 2022, has received little national or international attention by comparison.⁶ Their statement deserves to be known, however, because its analysis of the majority ruling on constitutional and human rights grounds could form the basis of future action to overturn the Supreme Court's majority ruling.

The three dissenting justices argued that the majority's ruling was: i. based on personal political opinions, not constitutional law; ii. went against legal precedent, a bedrock of US legal decisions that was affirmed in *Roe v. Wade* (1973) in relation to other closely related rights, which were reaffirmed in *Casey v. Planned Parenthood* (1992); iii. and violated a long list of human rights, particularly women's human rights.

The following summarize the main points made in the dissenting arguments. The page numbers in parentheses refer to the pages in the official text where these are found:

- Women's rights and their status as free and equal citizens have been curtailed. (p. 2)
- The freedom to have an abortion that *Roe* and *Casey* recognized is not a stand-alone freedom. The Supreme Court has linked it for decades to other settled freedoms, including bodily integrity, family matters, familial relationships, procreation, childrearing, the right to use contraception, the right of same-sex intimacy, the right to marry a person of one's choice, the right to have intimate relationships, and the right to decide with whom to have sex. These are all part of the same constitutional fabric, protecting autonomous decision-making in regard to the most personal of life decisions, and crucially, whether and when to have children. The freedom required (or denied) inevitably shapes the whole nature and future course of a woman's life (and often the lives of those closest to her). Thus, the court has long held that these freedoms belong to the individual, and not to the government, as the essence of liberty. (pp. 5, 22)
- The lone rationale for the judgment of the majority of the Supreme Court was that the right to

choose an abortion is not "deeply rooted in US history"—(1) because abortion was illegal in the 19th century (p. 26) and (2) because it was not until *Roe v. Wade* in 1973 that the right to have an abortion fell within the list of the US Constitution's guarantees of liberty. Thus, they implied that any rights currently guaranteed in the United States whose history does not stretch back to at least the mid-19th century are not secure and can easily be rejected. (p. 5)

- The Supreme Court majority did not appear to recognize that forced pregnancy, forced childbirth, and forced motherhood implicate a woman's rights to equality and freedom. Nor did they appear to think there was anything of constitutional significance regarding a woman's control over her own body and the path of her life. (pp. 12, 47) Historically, however, the Supreme Court's longstanding view has been that women indeed have rights to make the most personal and consequential decisions about their bodies and their lives, thus protecting "bodily integrity." And there are few greater incursions from government intrusion than forcing a woman to complete a pregnancy, give birth, and become a mother. (pp. 21–22)
- Similarly, *Planned Parenthood v. Casey* (1992) recognized that equal citizenship for women is inescapably connected to reproductive rights. (pp. 22–23) Moreover, *Casey* made it clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Supreme Court had held that a right to use and gain access to contraception was part of the 14th Amendment's guarantee of liberty. (p. 24)
- Any interest of the state in protecting fetal life played *no* part in the majority's analysis. (p. 26)
- Most medical treatments for miscarriage are identical to those used after induced abortions when needed. Blanket restrictions on abortion may therefore be understood to also deprive women of effective treatment for miscarriage, which occurs in 10–30% of pregnancies. (p. 36)
- The majority's ruling invites a host of questions

- about abortion causing interstate conflicts. Can one state bar women from traveling to another state to obtain an abortion? Can a state prohibit advertising of out-of-state, legal abortions or helping women reach an out-of-state provider? Can a state interfere with the mailing of abortion pills across state lines? The Constitution protects interstate travel, speech, and commerce, so this ruling will give rise to a host of new legal challenges. Far from removing the Supreme Court from the abortion issue, which the majority claim to have intended, the majority's ruling puts the court at the center of "interjurisdictional abortion wars" at the state level that the three dissenting judges could already see coming. (p. 37)
- For those who are told they will now have to continue an unwanted pregnancy, the outcome could be disastrous, especially for those without money or support. In states that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer. Yet the latter are the women most likely to seek an abortion in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. (p. 50) This in itself makes the ruling discriminatory.
 - In the end, the majority ruled as they did because they personally believed *Roe v. Wade* and *Casey* were "egregiously wrong" and because as individuals they oppose abortion, and they had enough votes to do so. (pp. 32, 33)
 - In *Planned Parenthood v. Casey* (1992) the then Supreme Court found that what *Roe* had said in 1973 had set a valid precedent. Thus, *Casey* was a precedent about an existing precedent, in line with the principle of *stare decisis* ("let the decision stand"). That is, in *Casey*, the court reviewed the same arguments made for overruling *Roe* as in 2022, but found that overruling *Roe* was not warranted. (p. 6)
 - Weakening *stare decisis* threatens to upend bedrock US legal doctrines, far beyond this and any other single decision. Weakening *stare decisis* creates profound legal instability. As *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one also calls into question the majority's commitment to legal principle and to the rule of law. (p. 57)
 - For all these reasons, the dissenting justices argued that the majority decision in this case greatly undermined the legitimacy of the US Supreme Court itself. (p. 59)
- Globally, an average of one in three or four women of reproductive age has an induced abortion in her lifetime; indeed, abortion is one of the most common medical procedures accessed by women worldwide.⁷ Criminalizing them is sex discrimination on a massive scale. Yet it does not stop abortions; it only makes them illegal and often unsafe. Ironically, it is rare for those who are anti-abortion, who often claim how "pro-life" they are, to acknowledge that dangerous abortions often kill those forced to resort to them. Nor did the Supreme Court majority consider whether every man or boy should be criminalized, too, if they make someone pregnant against their wishes, whether accidentally or intentionally.
- Both wanted and unwanted pregnancies can suddenly become a life-threatening emergency. In some cases, continuation of the pregnancy itself may threaten the woman's life, and emergency obstetric care, including in the form of an induced miscarriage, may be the only way to save her life. The US Supreme Court majority took no account of this as a possible (and not uncommon) outcome of a wanted pregnancy. Indeed, in the months since their ruling, this has been shown to be delaying provision of emergency treatment for miscarriage in US states where abortion has been severely restricted.⁸
- Moreover, forcing someone to continue an unintended or unwanted pregnancy may threaten or destroy their physical and mental health,

well-being, and life plans; for example, adolescent girls may be forced to drop out of school and not be able to return after having a baby.

The majority ruling also took no account of the following:

- Where abortion is illegal, the sudden appearance of a virus affecting fetal life, as happened with the Zika virus epidemic in 2015 in Brazil and elsewhere, can force women to give birth to severely damaged children who have no possibility of an independent existence.⁹
- The decision whether and when to have children, and the right to decide the number and spacing of children, have been confirmed as a woman's right in the United Nations (UN) International Conference on Population and Development (1994) and the UN Conference on Women (1995).
- Research has shown that unwanted children fare substantially less well in life than wanted children. Hence, forced pregnancy and forced motherhood can also greatly damage children.¹⁰
- Infanticide continues to be practiced in societies where women are unable to access safe or unsafe abortion. For example, research shows that many young women in Senegal were in jail in 2018 for infanticide.¹¹
- Internationally, as many as half a million pregnant women died or suffered serious morbidity annually due to lack of maternity care, until the World Health Organization and the international women's health movement began to campaign in the 1980s for the prevention of maternal mortality and morbidity, of which complications of unsafe abortions were and remain a substantial proportion.¹² Making and keeping abortion safe and legal is the only way to prevent avoidable maternal morbidity and mortality from unsafe abortions. This is a public health imperative.
- It is particularly important to highlight the per-

vasive discrimination the ruling has exacerbated against Black, Latina, immigrant, and undocumented women as well as all those living in poverty and without access to affordable health care.

- Safe abortion methods are among the many benefits of scientific research in human reproduction that were not available until the 20th century.

In addition to this long list of rights violations, the anti-abortion bias that underpinned the US Supreme Court's majority ruling is part of why the ruling was considered a violation of the rule of law by the dissenting justices—as it followed party political lines instead of constitutional law, let alone human rights law:

Overturning Roe v. Wade has been a core priority of the Republican Party since Ronald Reagan's election in 1980, if not earlier. Conservative organizations like Moral Majority, Focus on the Family, and the Federalist Society worked to ensure overturning Roe was central to the GOP's mission. Abortion has been prominent in the party's platforms and the governing agenda of every Republican president for decades. Republicans have sought to put anti-abortion justices on the Supreme Court and other federal courts, and through a series of untimely deaths and unprecedented power moves by Mitch McConnell, the unlikely figure of Donald Trump managed to place enough of them there to achieve that goal.¹³

Part II: The active role of international human rights bodies in hearing cases and recognizing safe abortion as a human rights imperative

It is possible for states, civil society organizations, and even individuals to report violations of human rights to UN treaty bodies and monitoring committees, including in relation to abortion rights, and to seek an appropriate ruling or response, including redress for harms to individuals. There is one important condition: the country concerned

must have ratified the whole or the relevant sections of the treaty or convention it is accused of violating.

First, it is imperative to understand that women have a right to life as a human right. This is crucial in seeking an appropriate ruling or response, including in challenging the US Supreme Court majority's ruling, because many anti-abortion movements, in the United States and elsewhere, seek to criminalize abortion on the ground that there is a competing "right to life from conception." However, a human rights-based analysis by Rhonda Copelon et al., published in 2005, argued that embryos and fetuses attain human rights only after they have been born (alive), not before birth.¹⁴ Moreover, the Convention on the Rights of the Child says nothing about there being fetal rights before birth.¹⁵

In 2018, the Human Rights Committee reviewed the meaning of "the right to life" for many reasons, controversy over abortion being one of them. After widespread consultation, it published *General Comment 36* on article 6 of the International Covenant on Civil and Political Rights, revising the existing definition of the right to life. The document includes one paragraph in relation to abortion (para. 8, page 2):

Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering, which violates article 7, discriminate against them or arbitrarily interfere with their privacy.¹⁶

Violations of abortion rights are increasingly being taken up by international human rights bodies. In 2017, three legal experts from the Center for Reproductive Rights published an evidence-based summary of the evolution of international and regional human rights norms that have recognized safe abortion as a human rights imperative. This showed how the progressive interaction of judicial and legislative developments on abortion rights across the globe has played a critical role in

liberalizing national laws, influencing high court decisions on access to abortion as a legal or constitutional guarantee, and served as an important resource in advancing international human rights norms and national law and policy reform. The countries whose law reforms they discussed included Argentina, Bolivia, Brazil, Colombia, Nepal, Peru, Rwanda, Spain and Uruguay. They concluded:

This increasingly progressive jurisprudence demonstrates the significant progress toward recognizing abortion as a human right and signals the transformative potential of such norms. Undoubtedly, translating these normative gains into concrete change in countries across the globe will continue to require sustained and concerted efforts by reproductive rights advocates and civil society actors more broadly, especially in light of the extensive stigma and discrimination—as well as lack of political will—surrounding abortion in many contexts. But by continuing to establish women's and girls' right to decide whether to carry a pregnancy to term as a fundamental aspect of the realization of their human rights, human rights bodies can further support the promise of gender equality. These normative developments can have a catalytic and transformative impact on national-level jurisprudence, laws, and policies, resulting in greater recognition globally of abortion as a fundamental aspect of women's reproductive autonomy and self-determination and ensuring women greater access to this essential reproductive health service.¹⁷

Thus, on June 24, 2022, the same day that the US Supreme Court majority struck down *Roe v. Wade*, a long list of UN human rights experts denounced their decision. No one could have written a stronger statement condemning the court's majority rejection of *Roe v. Wade*. It points to the implicit violence, the absence of sound legal reasoning, and the utter disregard of the United States' binding legal obligations under international human rights law displayed in the rejection of *Roe v. Wade*. In so doing, the statement supported and reinforced the dissenting arguments of Justices Breyer, Sotomayor, and Kagan. And they left no doubt, if there was any, that the court's majority had discredited itself in its judgment and violated the rule of law.¹⁸

Examples of specific cases heard by human rights bodies involving violations of abortion rights

Human Rights Committee

- *KL v. Peru*: This was the first decision of any international human rights body to hold a government accountable for failing to ensure access to legal abortion services. A 17-year-old was forced to continue a pregnancy even though the fetus had anencephaly and Peruvian law allows therapeutic abortion. KL was not only forced to carry the pregnancy to term but also to feed the baby until it inevitably died. The complaint defined this as inhumane and degrading treatment. In 2005, the Human Rights Committee ruled that denying access to legal abortion violates women's most basic human rights and that Peru had violated the right to privacy and special protection of a minor's rights. Women's Link Worldwide described this case as "a landmark ruling that confirms a State's positive obligation to provide therapeutic abortion when the pregnancy poses mental or physical threats to the girl/woman, especially if she is a minor."¹⁹ The committee also recognized that "mental suffering caused by the inability to access legal therapeutic abortions amounts to torture and cruel, inhuman and degrading treatment."²⁰
- *Mellet v. Ireland*: In her 21st week of pregnancy, Amanda Jane Mellet was informed that her fetus had congenital heart defects and trisomy 18, and would die in utero or shortly after birth. She had only two options: carry the pregnancy to term anyway or have a termination in another country. She traveled to England and received medication at a hospital in Liverpool to induce labor. Feeling weak and still bleeding, she traveled back to Dublin only 12 hours after the delivery, as she could not afford to stay in England. After her return, she received no aftercare at the hospital. Moreover, although she sought bereavement counseling, the hospital did not offer it at that time except to those who had experienced a stillbirth. In 2013, the Human Rights Committee found that this constituted cruel, inhuman, and degrading treatment, discrimination, and

arbitrary and unlawful interference with her right to privacy and that Ireland's abortion law violated the International Covenant on Civil and Political Rights. It called on the government to offer her compensation and counseling, and to change the laws to allow for abortion in cases of fatal fetal abnormality.²¹

Committee on the Elimination of Discrimination against Women

- *LC v. Peru*: In 2006, at age 13, LC began to be sexually abused by a man in his thirties, and became pregnant. In a state of depression, she attempted suicide by jumping from a building, suffering damage to her spine, causing paraplegia in her upper and lower limbs, and requiring emergency surgery. The surgery was postponed because she was pregnant. She was refused an abortion but miscarried. Due to the long delay before the surgery, she became paralyzed from the neck down and unable to walk again, requiring constant care. The Committee on the Elimination of Discrimination against Women recommended that Peru "provide reparations that include adequate compensation for material and moral damages and measures of rehabilitation, commensurate with the gravity of the violation of her rights and the condition of her health, in order to ensure that she enjoys the best possible quality of life ... [and] review its laws with a view to establish a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health."²²
- *Special inquiry on Northern Ireland*: In December 2010, the Committee on the Elimination of Discrimination against Women received information alleging that the UK had committed grave and systematic violations of rights under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) owing to the restrictive access to abortion for women and girls in Northern Ireland. The committee's ruling called for, among other things, the repeal of the sections of the UK's Offences against the Person Act 1861 that criminalize

abortion, and the legalization of abortion if there is a threat to the woman's physical or mental health, or grounds of rape or incest, or severe fetal abnormality.²³

Inter-American Commission on Human Rights

- *Artavia Murillo et al. v. Costa Rica*: This 2010 case was about in vitro fertilization (IVF) but with major implications for abortion rights. Its importance cannot be overstated. The American Convention on Human Rights, drafted in 1969 by legal experts, mainly from Latin America, stated in article 4.1 that “every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”²⁴ This clause had obvious anti-abortion implications. However, it was successfully challenged in a case opposing the criminalization of IVF in Costa Rica, heard initially by the Inter-American Commission on Human Rights. In August 2010, the commission ruled that Costa Rica could not criminalize IVF, as it was a violation of the right to life, personal identity, and individual autonomy of those who sought to use this technology in order to have biological children. The commission further found that Costa Rica's ban violated the rights to be free from arbitrary interference with one's private life, to create a family, and to equality. When Costa Rica failed to comply, the commission submitted the case to the Inter-American Court of Human Rights in July 2011. The court declared that Costa Rica had violated several provisions of the convention related to reproduction and having a family, including the articles on personal integrity, personal liberty, private life, family, and equality.²⁵

The court pointed out that no other international human rights convention or declaration protected the right to life prior to birth and that the IVF ban made the embryo's rights more important than the woman's rights, making the woman simply an instrument of reproduction.

- Brazil: The most recent case was heard on In-

ternational Women's Day, March 8, 2023, in Los Angeles, California, United States. Six civil society organizations—Ipas Brazil; Latin American and Caribbean Committee for the Defense of Women's Rights; Center for Reproductive Rights; Anis-Instituto de Bioética; Criola; and Portal Catarinas—provided information to the commission on the situation of sexual and reproductive rights in Brazil, using two exemplary cases from the states of Santa Catarina and Piauí. These illustrated what was happening nationally: the systematic denial of access to abortions that are legal under Brazilian law and institutional barriers for women and for girls under the age of 12. These cases also revealed intersectional discrimination that disproportionately affects Black women and girls living in situations of poverty and vulnerability. The group asked the commission to make concrete recommendations to the Brazilian state to ensure that legal abortion is available in all states, and particularly to ensure that for girls, abortion is never refused, even when the pregnancy is 22 weeks, and that girls should be considered autonomous to make their own informed decisions about whether or not to continue a pregnancy resulting from rape. The Brazilian government was represented by the Ministry of Foreign Affairs, which spoke for the Women and Racial Equality departments and the Ministry of Health. The ruling is pending.²⁶

The Committee against Torture, the Committee on the Rights of the Child, and the European Court of Human Rights have also heard cases comparable to those above and made recommendations related to abortion. These are not summarized here only for reasons of space.

The special roles of CEDAW and the Working Group on Discrimination against Women and Girls

In 1979, CEDAW became *the* comprehensive international convention addressing women's rights across political, civil, cultural, economic, and social life.²⁷ CEDAW's overriding purpose is to ensure that women not only have human rights but equal

rights. It is also the only convention that comprehensively protects women's sexual and reproductive health and rights. CEDAW has been ratified by 189 state parties. Ironically, although the United States played a significant role in drafting this convention and was the first state to sign it in July 1980 under President Jimmy Carter, the United States remains one of only six states worldwide that has not ratified it. The others are Somalia, Sudan, Iran, Palau, and Tonga (plus the Vatican). An analysis published by the Heinrich Boll Stichtung in 2019 argued:

*The United States is the only established democracy in the world failing to ratify CEDAW. While common justification lies in the realm of patriarchy and religion, another lies in the notion of American exceptionalism—its ... hubristic assumption that the United States is “above” or an “exception” to the law.*²⁸

At the same time, Melissa Upreti, a member of the OHCHR Committee on Discrimination against Women and Girls, argues that “although CEDAW has not been ratified by the US government, the government is obligated to refrain from undermining its objective and purpose.”²⁹

The Committee on the Elimination of Discrimination against Women, in its General Recommendation 35, paragraphs 18 and 29, in 2017 on gender-based violence against women, recognized the criminalization of abortion and the denial or delay of safe abortion and post-abortion care not only as violations of women's sexual and reproductive health and rights, but also as “forms of gender-based violence that ... may amount to torture or cruel, inhuman or degrading treatment.”³⁰

On July 1, 2022, in response to the Supreme Court's majority ruling on *Roe v. Wade*, the Committee on the Elimination of Discrimination against Women wrote to the United States and urged it to adhere to CEDAW in order to respect, protect, fulfill, and promote the human rights of women and girls. It endorsed “the statement by the [then] High Commissioner for Human Rights, Michelle Bachelet, that ‘access to reproductive rights is at the core of women and girls’ autonomy, and ability to make their own choices about their bod-

ies and lives, free of discrimination, violence and coercion’.”³¹

The Working Group on Discrimination against Women and Girls was established in 2010 and its members appointed by the Human Rights Council because

*there has been a need to constantly reiterate, even within the human rights system, that women are not just another vulnerable group ... They are half of the world population ...; hence, eliminating the persistent discrimination and backlashes against women's rights should be addressed both as a stand-alone goal and as a mainstreaming issue.*³²

Recent decriminalization of abortion by the Supreme Courts of Mexico and Colombia: Two national role models

The Supreme Court of Mexico ruled in September 2021 that it is unconstitutional to punish abortion as a crime. Each Mexican state now has the power to revise its existing laws accordingly.³³ Six of the 31 states plus the Federal District had done so as of March 8, 2023, the date when Puebla joined the other five. The ruling states that “no woman or pregnant person, nor any health provider who receives advice, assistance or defense from any of the three organizations that presented the amparo may be denied the medical service nor criminalized for having or assisting an abortion.” It also declares that the criminalization of abortion in Puebla's penal code is unconstitutional.

The Supreme Court of Colombia legalized abortion in the first 24 weeks of pregnancy in February 2022 and retained the existing, more limited legal grounds after 24 weeks. Justices from the two countries discussed these rulings at a panel hosted on October 21, 2022, at Harvard Law School.³⁴ One of the main reasons why both courts made these rulings, they said, was not only that safe abortion had become an issue of public health but also that unsafe, illegal abortion was understood to be a form of violence against women and girls, and no longer a religious or moral issue. Indeed, the *Causa Justa* movement launched in Colombia 25 years ago fought for abortion rights on precisely those grounds.³⁵ These two major national victories for

women's human rights—combining the right to health, the right to life, protection from the violence of unsafe abortion, and the right to bodily autonomy—are a beacon for the future for supreme courts in other countries as well.

Part III: A proposal that abortion rights advocates ask the Inter-American Commission on Human Rights to direct the US government to void the Supreme Court majority ruling on *Roe v. Wade*

The US government, like many others, is averse to being judged by any international body, including for (alleged) violations of human rights.

The striking down of *Roe v. Wade* was *not just* the act of anti-abortion justices deciding to reject settled US law based on their personal opinions, even though that is part of what has happened. It is also the culmination of everything that has taken place in the past 40 years in the United States, influenced both by powerful members of the Republican Party and by anti-abortion groups who reject any notion of women as rights holders and who claim to support “life” but when it comes to pregnancy, support only fetal life before birth, ignoring the consequences of forced pregnancy and motherhood for the woman and for the child. People with these views hold political power in many countries, and their abortion laws and treatment of pregnant women seeking abortions reflect these views. In the United States in the last four years, these views took control among the majority not just of the Supreme Court but of judges in other federal and state courts and state legislatures as well.

Thus, in the year since the Supreme Court majority struck down *Roe v. Wade*, a group of 15 independent human rights experts said in a press release on June 2, 2023:

Millions of women and girls across the United States have suffered an alarming deterioration in access to sexual and reproductive healthcare, following the US Supreme Court decision overturning the constitutional right to abortion in June 2022. As of January 2023, abortion has been banned in 14

*States across the country, and the consequences of the Supreme Court decision in the case of *Dobbs v. Jackson Women's Health Organization* have reverberated throughout the entire legal and policy system ... essentially dismantling 50 years of precedent protecting the right to abortion in the country.*³⁶

The complicated federal versus state power structure of the US legal system, devised to limit federal control, complicates this situation, not only giving US states and courts the freedom to pass contradictory and conflicting laws on one and the same subject, causing legal chaos, but even letting the smallest towns make abortion illegal within their city limits, as has happened in Nebraska, Iowa, Ohio, Texas, and Louisiana, dubbing themselves “sanctuary cities for the unborn.”³⁷

In this context, the question is whether an appeal to the Inter-American Commission on Human Rights has any chance of success. I believe such an appeal could serve as a motivating force, offering a potential lifeline. Certainly the appeal tabled by the Brazilian civil society organizations in March 2023 was well received by the Inter-American Commission and gave cause for hope, especially with the potential for turning to the Inter-American Court of Human Rights for adjudication further down the line.³⁸

Of course, for such a course of action to succeed, the US legal and judicial system, and especially the president and the Congress, would really need to step up too.

If the United States wants to be taken seriously as a democracy with a government that upholds human rights, and abortion rights is a good place to start under the circumstances, the government at all levels needs to become an active participant in the international human rights community, to acknowledge, ratify, and implement international human rights, in this instance starting with CEDAW, and to ensure that all US laws and rulings on abortion at both the state and national level are in line with CEDAW and other relevant human rights treaties and conventions as well. Now that *would* be a coup and not just in the United States.

Disclaimer

This perspective is written in the individual capacity of the author.

References

1. Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948).
2. *Ibid.*
3. Office of the United Nations High Commissioner for Human Rights, "View the Ratification Status by Country or by Treaty," https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN.
4. J. Gerstein and A. Ward, "Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows," *Politico* (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.
5. K. Cheney and J. Gerstein, "Federal Judge Says Constitutional Right to Abortion May Still Exist, Despite Dobbs," *Politico* (February 6, 2023), <https://www.politico.com/news/2023/02/06/federal-judge-constitutional-right-abortion-dobbs-00081391>.
6. 597__U.S. (2022), Breyer, Sotomayor, and Kagan, JJ. Dissenting. Supreme Court of the United States. No. 19-1392. Thomas E. Dobbs...v. Jackson Women's Health Organization et al. (June 24, 2022), <https://s3.documentcloud.org/documents/22067259/dobbs-dissent.pdf>.
7. J. Bearak, A. Popinchalk, B. Ganatra, et al., "Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019," *Lancet Global Health* 8/9 (2020).
8. See E. Cohen and J. Bonifield, "Texas Woman Almost Dies Because She Couldn't Get an Abortion," *CNN* (November 16, 2022), <https://edition.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html>. See also P. Belluck, "They Had Miscarriages, and New Abortion Laws Obstructed Treatment," *New York Times* (July 17, 2023), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>.
9. Special Rapporteur on Torture, Special Rapporteur on Violence against Women, Working Group on the Issue of Discrimination against Women, et al., "Ref: Denial of Abortion Services and the Prohibition of Torture and Cruel, Inhuman and Degrading Treatment," submission to Honorable Madame Justice Ministra Cármen Lúcia concerning petition number ADI/ADPF 5581, <https://www.ohchr.org/sites/default/files/AmicusBrazilFINAL.pdf>.
10. H. David, "Born Unwanted: Mental Health Costs and Consequences," *American Journal of Orthopsychiatry* 81/2 (2011).
11. N. Archer, A. Finden, and H. Pearson, "The Law, Trials and Imprisonment for Abortion in Senegal," *International Campaign for Women's Right to Safe Abortion Newsletter* (April 23, 2018), <https://www.safeabortionwomensright.org/news/senegal-the-law-trials-and-imprisonment-for-abortion/>.
12. E. Royston and S. Armstrong (eds), *Preventing Maternal Deaths* (Geneva: World Health Organization, 1989).
13. S. Masket, "Republicans Paid a Price for Overturning Roe. It May Have Been Worth It," *Politico* (November 19, 2022), <https://www.politico.com/news/magazine/2022/11/19/republicans-roe-abortion-midterms-00069484>.
14. R. Copelon, C. Zampas, E. Brusie, and J. Devore, "Human Rights Begin at Birth: International Law and the Claim of Fetal Rights," *Reproductive Health Matters* 26 (2005).
15. Convention on the Rights of the Child, G.A. Res. 44/25 (1989).
16. Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36 (2018), para. 8.
17. J. B. Fine, K. Mayall, and L. Sepúlveda, "The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally," *Health and Human Rights Journal* 19/1 (2017).
18. M. Upreti, D. Estrada Tanck, E. Broderick, et al., "Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade" (June 24, 2022), <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down>.
19. Women's Link Worldwide, "Peru: Human Rights Committee; K.L v. Peru; Why It Matters," <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/kl-v-peru>.
20. Center for Reproductive Rights, "KL v. Peru (United Nations Human Rights Committee)," <http://reproductiverights.org/en/case/kl-v-peru-united-nations-human-rights-committee>.
21. Human Rights Committee, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 2324/2013, Amanda Jane Mellet v. Ireland, UN Doc. CCPR/C/116/D/2324/2013 (2016); Irish Council for Civil Liberties, "Case in Focus: Amanda Mellet," <https://www.iccl.ie/her-rights/privacy/case-focus-amanda-mellet>.
22. *LC v. Peru*, Committee on the Elimination of Discrimination against Women, views of November 4, 2011, communication no. 22/2009; E. Kismödi, J. Bueno de Mesquita, X. Andión Ibañez, et al., "Human Rights Accountability for Maternal Death and Failure to Provide Safe, Legal Abortion: The Significance of Two Ground-Breaking CEDAW Decisions," *Reproductive Health Matters* (2012).
23. Committee on the Elimination of Discrimination against Women, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination

of All Forms of Discrimination against Women, UN Doc. CEDAW/C/OP.8/GBR/1 (2018).

25. American Convention on Human Rights, O.A.S. Treaty Series No. 36 (1969), art. 4.1.

26. “Artavia Murillo (‘In Vitro Fertilization’) v. Costa Rica,” <https://uniteforreprorights.org/resources/artavia-murillo-et-al-vitro-fertilization-v-costa-rica>.

27. “Beatriz Galli, Hearing on the Situation of Sexual & Reproductive Rights in Brazil at the Interamerican Commission on Human Rights, 8 March 2023,” *International Campaign for Women’s Right to Safe Abortion Newsletter* (April 13, 2023), <https://www.safeabortionwomensright.org/news/brazil-hearing-on-the-situation-of-sexual-reproductive-rights-in-brazil-at-the-interamerican-commission-on-human-rights-8-march-2023/>.

28. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 (1979).

29. L. Schlalatek, “CEDAW and the USA: When Belief in Exceptionalism Becomes Exemptionalism,” Heinrich Boll Stiftung Green Political Foundation (December 10, 2019), <https://www.boell.de/en/2019/12/10/cedaw-and-usa-when-belief-exceptionalism-becomes-exemptionalism>.

30. Email from M. Upreti to the author (November 14, 2022).

31. Committee on the Elimination of Discrimination against Women, General Recommendation No. 35, UN Doc. CEDAW/C/GC/35 (2017), paras. 18, 29(c)(i).

32. Office of the United Nations High Commissioner for Human Rights, “Access to Safe and Legal Abortion: Urgent Call for United States to Adhere to Women’s Rights Convention, UN Committee” (July 1, 2022), <https://www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights>.

33. Office of the United Nations High Commissioner for Human Rights, “About the Mandate: Working Group on Discrimination against Women and Girls,” <https://www.ohchr.org/en/special-procedures/wg-women-and-girls/about-mandate>.

34. “Mexico: Supreme Court of Justice of the Nation Ruling Sets the Scene for National Decriminalization of Abortion,” *International Campaign for Women’s Right to Safe Abortion Newsletter* (August 9, 2021), <https://www.safeabortionwomensright.org/news/mexico-supreme-court-of-justice-of-the-nation-ruling-sets-the-scene-for-national-decriminalisation-of-abortion/>.

35. A. J. Montgomery, “Mexican, Colombian Supreme Court Justices Discuss Path to Abortion Rights at Petrie-Flom Center Forum,” *Harvard Crimson* (October 24, 2022), <https://www.thecrimson.com/article/2022/10/24/latin-american-abortion-rights-talk/>.

36. A. C. González Vélez, “Causa Justa, el movimiento que dio un giro al debate sobre el aborto en Colombia,” *LSE Blogs* (March 17, 2022), <https://blogs.lse.ac.uk/latamcaribbe->

[an/2022/03/17/causa-justa-aborto-colombia-2022/](https://blogs.lse.ac.uk/latamcaribbe-an/2022/03/17/causa-justa-aborto-colombia-2022/).

37. Office of the United Nations High Commissioner for Human Rights, “United States: Abortion Bans Put Millions of Women and Girls at Risk, UN Experts Say” (June 2, 2023), <https://www.ohchr.org/en/press-releases/2023/06/united-states-abortion-bans-put-millions-women-and-girls-risk-un-experts-say>.

38. E. Rembert, “Small Towns Are Passing Local Laws Banning Abortions Post-Roe v. Wade,” NPR (November 23, 2022), <https://www.npr.org/2022/11/23/1139078099/small-towns-are-passing-local-laws-banning-abortions-post-roe-v-wade>.

39. “Beatriz Galli, Hearing on the Situation of Sexual & Reproductive Rights in Brazil at the Interamerican Commission on Human Rights” (see note 26).