Leonard v.B. Sutton Colloquium

UNIVERSITY OF DENVER STURM COLLEGE OF LAW

HUMAN RIGHTS AND REPRODUCTIVE JUSTICE: International and Comparative Perspectives

February 15, 2025

The Ved Nanda Center for International & Comparative Law
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Book of Abstracts

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2. **Introduction**:

This year, the Leonard v.B. Sutton Colloquium will highlight the role of international and comparative human rights law in advancing reproductive justice, a topic at the forefront of legal and societal debates in many jurisdictions. The Colloquium papers will explore relevant developments in global, regional, and national human rights jurisprudence. We are privileged to host a diverse group of esteemed scholars who will share their insights from various legal systems around the world.

3. **Keynote Address**

- ***The Discriminatory Dimensions of Reproductive Health***

  Rebecca J. Cook, Professor Emerita in the Faculty of Law, the Faculty of Medicine and the Joint Centre for Bioethics, University of Toronto

This paper explores how gender discrimination in the reproductive health context has been neglected. It analyzes how theories of discrimination, including pluralistic, intersectional, and systemic theories, might be applied to overcome this neglect. It builds on the CEDAW Reports under the Inquiry Procedure of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women to sketch answers to the question of what makes discrimination systemic and addresses why this particular theory of discrimination is important to improve reproductive health.

4. **Abstracts**

- ***Inter-American Reproductive Autonomy***

  Rosa Celorio, Burnett Family Associate Dean and Distinguished Lecturer for International and Comparative Law and Policy, George Washington University of Law

The Inter-American Court of Human Rights has become known for its prolific jurisprudence on women's rights issues. Even though it took the

Court decades to rule in its first comprehensive women's rights judgment in 2009 in *González et al. ("Cotton Field") v. Mexico*, the Court has developed a remarkable body of case law emphasizing five areas in particular: 1) violence, due diligence, and access to justice; 2) intersectional discrimination; 3) sexual and reproductive rights; 4) economic, social, and cultural rights; and 5) issues concerning women in LGBTIQ+ communities. The Court's judgments illustrate the diverse experiences of both adult women and girls, and the need for urgent state action to prevent and respond to multiple gender-based human rights violations.

In the process of carving detailed jurisprudence to address a range of women's rights, the Inter-American Court has introduced the concept of *reproductive autonomy*, pointing to a women's need for self-determination and free choices in areas critical to their sexual and reproductive health, including access to assisted reproductive technologies and informed consent over medical procedures. This article will discuss the introduction of this concept in the jurisprudence of the Inter-American Court of Human Rights; its development by the Inter-American Court to date; and its potential contours for the future, considering the current jurisprudential docket of the Court. This kind of scholarly reflection is critical in a region with stark contradictions when it comes to the protection of women's sexual and reproductive rights, in areas such as abortion.

The author is currently working on a series of articles studying closely the work of regional human rights courts and opportunities to develop legal standards that are effective to respond to contemporary problems women face. In this line of research, the author has been studying closely the increasing pivot towards women's autonomy in international case law, as the possibility for women to express their identities, carve their life plans, and exercise their self-determination, free from government interferences. This article analyzes these issues from a regional perspective, at times drawing comparisons with other regional Courts, the universal system of human rights, and the work of the Inter-American Commission on Human Rights.

- ***Abortion and the European Court of Human Rights***

  Fiona de Londras, Barber Professor of Jurisprudence, Birmingham Law School, University of Birmingham

The European Court of Human Rights' jurisprudence on abortion lags significantly behind that of other international human rights bodies. This paper will provide a critical overview of the Court's abortion jurisprudence, demonstrating how it distorts established principles of European human rights law, fails to keep pace with evidence from international human rights and public health research, and ultimately exceptionalises abortion within the European human rights regime, perpetuating decades-long, non-evidence-based restrictions on abortion across Europe.

- ***Empowering Women's Rights: Unleashing the Multilevel Power of Feminist Constitutionalism in Abortion Cases***

  Melina Girardi Fachin, Dean of the Law School and Associate Professor, Federal University of Paraná

The landscape of constitutional law is changing due to critical perspectives like feminist constitutionalism. This approach adopts a transversal, integrated, comparative, and multilevel dimension. By exploring different constitutional experiences, it reveals the structural oppression faced by women and offers a broader perspective. The Inter-American system has been instrumental in advancing the protection of women's human rights within this framework.

Feminist constitutionalism also redefines the principles of equality and non-discrimination by emphasizing the constitutional protection of difference. Diversity is a key aspect of this approach, which recognizes identities and the right to be different based on an emancipatory and egalitarian platform.

This multilevel understanding of constitutional law, combined with feminist constitutionalism, has great potential for protecting women's rights, particularly in the context of abortion. By advocating for gender equality, reproductive autonomy, and non-discrimination, legal advocates can use a multilayered approach to challenge restrictive abortion laws and

promote women's reproductive health and rights. By leveraging interconnected sources of constitutional law (international human rights instruments, regional agreements, and domestic legislation), feminist activists and lawyers can make significant progress in advancing women's reproductive rights, promoting greater gender equality and empowering women to exercise agency in their reproductive choices.

- ***Intersex Rights & Reproductive Justice***

  Holning Lau, Willie Person Mangum Distinguished Professor of Law, University of North Carolina School of Law

Intersex children are often subjected to so-called "gender normalizing" surgeries that are medically unnecessary. These surgeries can result in loss of sexual function and even sterilization, compromising reproductive health and limiting reproductive choice. Various United Nations entities—including the WHO, human rights treaty bodies, special rapporteurs, and the Office of the High Commissioner for Human Rights—have called for ending medically unnecessary surgeries on intersex children. This presentation will provide an overview of these international developments. Afterwards, it will discuss recent U.S. legislation that is at odds with these international developments. Specifically, the presentation will examine laws that ban gender-affirming healthcare for transgender youth while maintaining the legality of so-called gender normalizing surgeries on intersex youth.

- ***The Constitutional Fight for the Complete Decriminalisation of Abortion: Nepal and the Rights-Based Approach in Comparative Perspective***

  Mara Malagodi, Reader in Law, School of Law, University of Warwick

Demands for the complete decriminalisation of abortion have recently grown more assertive in many jurisdictions, and the constitutional domain has become a key battlefield. However, very few jurisdictions today no longer criminalise abortion under any circumstance: the People's Republic of China (1979), Canada (1988), Northern Ireland (2019), New Zealand

(2020), and Australia (2021). These most recent legal changes – whether via constitutional litigation or statutory reform – are steeped in the language of gender constitutionalism and human rights.

In this respect, Nepal represents fertile constitutional terrain to wage a fight for complete decriminalisation. In fact, the country's 2015 Constitution is at the global forefront of reproductive rights protection. First, these rights are explicitly enshrined in the constitutional text. Second, the Supreme Court of Nepal has handed down groundbreaking decisions on abortion stating clearly that abortion should be outside the purview of the criminal law. Capitalising on this opportunity structure, in 2021 two young activist Nepali lawyers with iProbono and LAPSOJ, Bandana Upreti and Sumana Kaphle, filed a Public Litigation Petition in the Constitutional Bench of Nepal's Supreme Court seeking to decriminalise abortion. More specifically, the petition asked the Court to strike down as unconstitutional the provisions of the Penal Code 2017 and Safe Motherhood and Reproductive Rights Health 2018 that continue to criminalise abortion. While the case remains pending, other advocacy strategies have been deployed alongside to decriminalise abortion.

The present paper analyses the history of this case, the arguments marshalled in the petition, and the litigation strategy adopted. It also examines the case study of Nepal in its broader comparative constitutional context to assess the possibilities and limits of rights-based approaches in securing reproductive justice.

- ***(Un)Breathing Life into the Maputo Protocol: A Critique of the African Commission's Decision on Maternal Mortality***

  Satang Nabaneh, Research Professor of Law, University of Dayton Human Rights Center

In May 2023, the African Commission on Human and Peoples' Rights (ACHPR) issued its first decision on maternal mortality under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in *Community Law Centre and Others v. Nigeria* (Communication 564/2015). This decision marks a historic milestone, coming twenty years after the Protocol's adoption. The

Commission found that the Nigerian government's actions, or lack thereof, did not violate any rights under the African Charter on Human and Peoples' Rights (African Charter) or the Maputo Protocol, despite the critical role that reproductive policies play in shaping conditions for individuals to exercise their reproductive rights, while simultaneously navigating economic, social, and ideological constraints. In Sub-Saharan Africa, the urgency of these issues is underscored by persistently high maternal mortality ratios, with an estimated 545 maternal deaths per 100,000 live births annually. This decision highlights both the progress made and the persistent challenges in advancing sexual and reproductive health and rights (SRHR) across Africa. It also comes against the backdrop of the Ugandan Constitutional Court's 2020 decision in *Center for Health, Human Rights and Development (CEHURD) and 3 Others v. Attorney General*, which found that the preventable deaths of two women due to a lack of basic maternal care in a hospital constituted a violation of their rights to health, life, gender equality, and freedom from inhuman and degrading treatment.

From a reproductive justice lens (health, rights, justice), this article examines the far-reaching consequences of this landmark case, highlighting the gap between the normative standards set by human rights mechanisms and their ability to advance progressive jurisprudence on reproductive rights.

- ***From the Right to Choose to the Virtuous Victim: Advocacy for Reproductive Autonomy in the United States***

  Carole J. Petersen, Cades Foundation Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa

Since the US Supreme Court overruled Roe v. Wade and Planned Parenthood v. Casey, advocacy for abortion care in the United States has increasingly focused on the experiences of the "virtuous victim." She is typically a victim of rape or incest or a loving wife who wanted to be pregnant but suddenly required an abortion to preserve her life or health. This emphasis on tragic outcomes is understandable given that many states have adopted strict bans on abortion care, which lack compassionate

exceptions. The compelling stories of the families that have been adversely affected by these laws may also help to advance some aspects of the reproductive justice movement, which includes far more than the simple right to choose not to be pregnant. But the "virtuous victim" narrative could eventually undermine rights-based arguments for full decriminalization of abortion, which is essential to women's rights to liberty, equality, and self-determination. Ironically, this shift in discourse comes at a time when the abortion pill has given many women greater control over their fertility and when international human rights treaty-monitoring bodies are adopting a more rights-based approach to reproductive autonomy.

- ***Synthesis Theorisation***

  Gauri Pillai, Lecturer-in-Law at the University of Bristol Law School

What does a constitution do when faced with claims for reproductive rights and a constitutional text that says nothing about them? The usual answer is to read reproductive rights into the constitutional right to liberty or privacy. Some argue that the right to equality is a better home for these rights. For others, both equality and privacy are central; a reproductive rights claim should be a combination of the two. Indian constitutional law agrees but also offers an additional step. Instead of merely combining equality and privacy to house reproductive rights, it suggests that they be read in 'synthesis' with one another, creating a space for dynamic rights interaction. Yet, the synthesis, as method of rights analysis, remains underdeveloped within Indian constitutional law. My central task is therefore to theorise the synthesis and develop it.

For this, I turn to international human rights law, a field where mutually supporting relationships between rights are already common. I locate the synthesis amongst, but distinguish the synthesis from, existing mutually supporting relationships: rights' interdependence, rights' interrelatedness and rights' indivisibility. I craft a fourth category – rights' interaction – which I term the synthesis. I conclude by applying the synthesis to reproductive rights to show how their adjudication is transformed when the synthesis is relevant constitutional paradigm.

- ***This is Not a Tango - Latin America Conscientious Objection Clauses in Healthcare***

Agustina Ramón Michel, Adjunct Professor at the Law School of the University of Palermo and **Dana Repka,** Graduate Student, University of Toronto

Conscientious objection (CO) in healthcare allows providers to refuse certain medical procedures or treatments due to personal moral or religious beliefs. Initially introduced in the 1970s alongside the decriminalization of abortion in Western Europe and the United States, CO clauses have since been adopted globally, becoming part of constitutions, healthcare laws, and administrative regulations. This expansion has led to barriers in patient care, internal conflicts within healthcare teams, and significant challenges for decision-makers, sparking debates in both constitutional and international law, and public health.

CO in healthcare differs significantly from its traditional use in military service. In the military context, an individual objects to mandatory conscription to preserve personal moral integrity, resulting in a clash with the State's interest in ensuring national security. In contrast, in healthcare, more complex dynamics emerge, as providers' refusals can infringe upon patients' fundamental rights and their ability to exercise their own conscience.

To study how countries around the world address this phenomenon, we conducted an exhaustive analysis of over 400 constitutional, legal, and regulatory provisions on CO to abortion from 180 countries. We identified a widespread global adoption of a liberal model to regulate CO, which, inspired by Mill's harm principle, recognizes an individual's right to object, albeit with limits, exclusively imposing obligations on conscientious healthcare professionals.

However, as this liberal approach has proven insufficient to prevent the impact of CO on patients, various legislatures and courts have recently responded by incorporating institutional safeguards, requiring healthcare institutions and the state to adopt positive measures to counteract such impacts.

Latin America stands out as one of the epicenters of this more structural model. Not only have its high courts encouraged these institutional safeguards, but regionally, the Inter-American system has also begun, albeit in a more incipient and timid manner, to move in that direction inspired by national courts. Although it is still taking shape and is relatively undertheorized, we argue this new approach to CO may offer a more balanced solution to the tensions arising from providers' refusals in healthcare, particularly in a complex system like healthcare.