



Comparative Study of Abortion Law in India and U.S.A.

Ms. Shivanjali Bhoite¹

Introduction

Any reproductive choice is a decision having a direct impact and the greatest bearing, only on the concerned individual(s). Like marriage and other aspects of family life, which have a limited effect on the community, it is an area ordinarily left to individual decision-making. Thus, by its very nature, the right to reproductive choice is an aspect of the right to privacy or the “right to be let alone.”

On one hand, women may be forced to undergo abortion even when they don't want to — as with female foeticides. On the other, she may be compelled to reproduce against her wishes. Stereotypical depictions of women as homemakers and mothers only contribute to these factors.

As a result, women often resort to illegal or unsafe abortion methods. Studies have estimated that millions of women undergo abortion each year and over 50% of those are done in highly unsafe environments. Neither the Indian nor the U.S. Constitution explicitly recognizes the right to procreative choices or even the broader concept of the right to privacy.

CONSTITUTIONAL PERSPECTIVES ON PROCREATIVE CHOICES

In the U.S., the right to privacy has achieved constitutional status on the ground that it is one of the elements of “liberty” protected by the Due Process Clause.² U.S. courts have interpreted the right broadly and have extended it to cover numerous other rights³ After the Supreme Court's decision in *Griswold v. Connecticut*,⁴ it is now well settled in American constitutional jurisprudence that the right to privacy is wide enough to protect procreative choices from unreasonable State interference. In subsequent decisions, courts have invalidated requirements of parental consent, spousal consent etc., in abortion laws on the grounds of violation of the

right to privacy⁵. Thus, in contemporary times, the recognition of the right to privacy or the right to reproductive choice is no longer a subject of controversy.

“Reproductive right, which of course is a human right, is based on the human dignity,” he said. “When we talk of reproductive rights, it is mixed with another right of women. When we talk of reproductive rights in India, there again the choice is of the husband in the family or what the elders say...when there should be a child, whether that child should be male or female etc.” In a country where patriarchy enjoys a deep-rooted foundation in everyday lives, women are often subject to the judgement of their spouse and family. In India it is a part of Art. 21 i.e. right to life and personal liberty.

COMPARATIVE STUDY IN USA AND INDIA

The issue of abortion has been hotly debated in the U.S. since the early seventies. The two clashing interests underlying the abortion debate are the mother's right to make reproductive choices, which is derived from her right to personal liberty and privacy, and the fetus' right to life. The anti-abortion groups, that is, the pro-lifers, primarily consist of those who are guided by religious beliefs, in arguing against abortion. The pro-lifers include the Catholic Church, orthodox Jews and fundamentalist Protestants.⁶ They assert that human life begins at the stage of conception and hence argue that the fetus qualifies as a constitutional person enjoying the right to life under the American Constitution.⁷ Their thesis therefore, is that abortion, which violates the fetus' right to life, is nothing short of murder.⁸

In the last few decades, courts in the U.S. have been faced with a barrage of cases challenging the constitutionality of statutes that seek to impose restrictions on abortion. At issue



has been the clash of the State's interests in restricting abortion in light of religious beliefs and maternal health concerns and the woman's right to make independent reproductive choices.

The U.S. Supreme Court made its first attempt to resolve the conflicting interests at the root of the abortion debate, in *Roe v. Wade*⁹. The case involved a challenge to a Texas law which made all abortions, except those necessary to 'save the mother's life, illegal. The Court held that the unborn child does not qualify as a constitutional person and hence, does not enjoy the right to life.¹⁰ Subsequent decisions have affirmed the view taken in *Roe*.¹¹

In *Roe*, the Court also held that the right of privacy under the U.S. Constitution is broad enough to protect the right to abort.

The broad trend in the U. S. after the decision in *Roe* has been one of privileging personal liberty and autonomy, and the related right to privacy, over the interests of the State. Although in *Roe*, the Court held that there is no absolute right to privacy, it also declared that this right is a fundamental one, thus paving the way for strict scrutiny of government regulations relating to abortion.¹² The *Roe* decision was pioneering in that it recognized that the State's interest's in protecting unborn life cannot be allowed to override the interests of a pregnant woman, as pregnancy has a perceptible impact on the woman. Speaking for the Court, Blackmun, J. held that pregnancy has an impact on a woman's psychological, mental and physical health, which cannot be ignored by imposing unreasonable restrictions on the right to abort. At the same time, the Court also recognized that the State has an interest in "safeguarding health, in maintaining medical standards, and in protecting potential life."¹³

Court sought to harmonize State interests with the right to reproductive autonomy by introducing the trimester framework. It was held that in the first trimester of pregnancy, an abortion poses little danger to maternal health, so that the State cannot be said to have any interest in regulating abortions. In the second trimester, the State could regulate abortion to the extent that it reasonably relates to the protection of maternal

health. Finally, beyond the period of viability, the State may prohibit abortion, except where it is necessary to preserve maternal health.¹⁴

Some aspects of the decision in *Roe*, that IS, the rigid trimester framework, and the ruling that there is a fundamental right to abortion, have been rejected in the case of *Planned Parenthood of Southern Pennsylvania v. Casey*¹⁵. However, the Court once again recognized that pregnancy has too great an impact on a woman's life and body for the State to prevent her from avoiding such impact, and deciding to abort the fetus.

In *Casey*, the Court replaced the trimester framework with the "undue burden" test whereby a restriction that placed an "undue burden" on the woman's right to abortion at any point during the pregnancy would be declared unconstitutional¹⁶. This "undue burden" test has an adverse impact on the right to abortion, and is worthy of criticism. In contrast to the earlier situation in which the State had to show a compelling interest for imposing the restrictions, the onus is now on the woman to show that the regulation places an "undue burden" on her reproductive choices. Thus, the *Casey* decision is a regressive step for the liberal attitude of the U.S. Courts in the context of reproductive rights.

Interestingly, debates centered on the right to abort have been largely nonexistent in the Indian context. What may be mistaken as societal apathy sprouts from the fact that activist groups can find little fault with the Indian State's tolerant policy towards abortion. Although the M.T.P. Act is in the nature of an exception to the general prohibition against abortion under the Indian Penal Code,¹⁷ the grounds on which it permits abortion are widely worded¹⁸. The American pro-abortion campaign was sparked off by an unfavorable State policy towards abortion. Since the Indian State has been in *favour* of abortion due to its demographic concerns, a campaign against abortion laws was never the key agenda for feminist or other activist groups in India.

As far as the judicial attitude is concerned, it must be noted that many facets of reproductive rights such as surrogacy or involuntary sterilization that have captured attention in the U.S. are yet to be debated in Indian court rooms.



However, the attitude of the Indian judiciary to the right to reproductive choices may be gleaned from decisions that have dealt with issues such as abortion in divorce cases.

The question that has been posed before Indian Courts most often is whether abortion without spousal consent amounts to cruelty, which is recognized as a ground for divorce in India. The Punjab and Haryana High Court decision in the case of *Satya v. Siri Ram*¹⁹ is a fitting illustration, where the Court held that the termination of pregnancy without the husband's consent where he had "legitimate craving to have a child" amounts to cruelty.²⁰

The attitude of the Indian judiciary, thus, reveals a complete disregard of the pregnant woman's right to privacy, and her right to make independent reproductive choices.²¹ The U.S. judiciary, on the other hand, has been sensitive to the fact that pregnancy has a strong impact on a woman's health and lifestyle, and that the effects of pregnancy are borne by the woman alone.²² Such a discussion is entirely missing from Indian decisions that touch upon the issue of reproductive autonomy. Hence, there is a sharp contrast between the judicial attitudes towards the reproductive rights of women in India and the U.S.

Spousal or parental consent as a requirement for abortion under abortion statutes has been the subject of much controversy and debate in the U.S. In a series of cases in the late seventies, the U.S. Supreme Court invalidated laws requiring parental consent for abortion by minors.²³

These decisions are based on the reasoning that the Constitution makes no distinction between persons in the conferment of rights. Hence, there is no justification for making an arbitrary distinction between minors and adults in recognizing the right to abortion. However, U.S. Courts have recognized that the State has a "broader authority" to regulate the activities of children.²⁴ Further, it has been suggested that a statute providing for mandatory parental consent would pass judicial scrutiny if it provided for an alternate means of authorizing an abortion.²⁵ In more recent decisions, the U. S. Supreme Court has abandoned its liberal view towards the

requirement of parental consent by upholding laws requiring such consent for abortion.²⁶

The issue of spousal consent involves a balancing of the woman's right to privacy and personal autonomy and the spouse's interests in the life of the unborn child. According to the liberal view, since the effects of pregnancy on lifestyle and health are borne by the woman alone, the decision to abort or not should be exclusively hers. The man being a mere onlooker cannot enforce his choice, for the repercussions of the decision operate exclusively on the woman. A contrary view is that since both spouses contribute to conception, the ultimate decision regarding abortion should involve the consent of both individuals. U.S. courts have consistently adopted the former view, even going to the extent of invalidating laws requiring spousal notification prior to abortion.²⁷

In India, the M.T.P. Act, which lays down the grounds under which an abortion may be legally performed, does not require that spousal consent be obtained before abortion. However, section 3(4) (a), M.T.P. Act, states that the pregnancy of a minor woman cannot be terminated without the written consent of her guardian. Clause (b) of the same provision runs as follows:

Save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

On a plain reading of the statute, it appears that it permits the consent of a minor woman to be dispensed with, if an abortion is to be performed on her, so long as her guardian's written permission is available. As discussed, statutes with similar provisions have been invalidated by the U.S. courts.

Unlike in the U.S., no challenge has been posed to the constitutionality of such a requirement in India. However, the requirement of parental consent has been discussed in a 1993 decision of the Madras High Court.²⁸ In a judgment that is unique for its liberal attitude towards reproductive rights, the Court held that section 3 does not imply that a pregnant minor's consent is dispensable in making a decision to abort. It was held that while parental consent is a pre-requisite for an abortion to be



performed on a minor, it cannot be a substitute for the minor's personal consent.²⁹ While this interpretation runs contrary to a plain reading of the provision, it was necessary in order to accord some meaning to a minor's right to reproductive choices.

State Policy

Many of the issues involving reproductive rights that have been debated at the policy level in the U.S. are yet to be addressed in India. The comparison of State policy towards reproductive rights in the two countries would be most fair and effective from the standpoint of abortion, since this is an issue that has been widely discussed in both countries.

To begin with, the U.S. permitted abortion with the consent of the pregnant woman, at all stages prior to "quickening."³⁰ By the beginning of the American Civil War, however, a strong anti-abortion campaign took root. At the forefront of the protests were Christian lobbyists arguing that life begins at conception. In what can be seen as a blurring of the traditional separation between the Church and the State, nearly all States had passed laws banning abortion, by 1965³⁰.

Thus, the history of abortion law in the U.S. suggests that State intervention has been motivated primarily by the lobbying of strong religious groups. States have also intervened on the grounds of health concerns, that is, the understanding that abortion, if unrestricted, could pose a threat to the life of mother or child under certain circumstances.

The gradual move back to the legalization of abortion thereafter was fallout of intense campaigning by vocal feminist movements. In the U.S., therefore, abortion has primarily been viewed as an exercise of a woman's right to personal liberty. This right received judicial recognition in 1973, when the Supreme Court invalidated anti-abortion laws on the ground that such laws violated a woman's right to reproductive choice, which was inherent in her right to personal liberty.

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In India, abortion is a criminal offence, as per the provisions of the Indian Penal Code, 1860³¹. In the year 1971, Parliament passed the Medical Termination of Pregnancy Act ("M.T.P. Act"), which is an exception to section 312, Indian Penal Code, and permits abortion where the continuance of the pregnancy will cause "grave injury to mental or physical health." Interestingly, the explanation to the section provides that the anguish caused by a pregnancy resulting from the failure of family planning methods constitutes "grave injury to mental health" for the purposes of the Act. Strangely enough, this explanation applies only to married women, and does not recognize the anguish caused to an unmarried woman by an unwanted pregnancy. This indicates that the Act was motivated not by libertarian ideals but by the need to promote abortion as a family planning tool³². Hence, the limited legalization of abortion in India was more a fallout of Malthusian fears among policy makers³³.

Conclusion

The U.S. courts have been overtly zealous in seeking to protect the woman's right to abort. Mere spousal notification prior to the abortion is distinctly different from conferring a veto power to decide on abortion, on a person other than the pregnant woman. Such a requirement merely recognizes the husband's legitimate interests in participating in reproductive choices, by affording him an opportunity to influence the woman's final reproductive decision.³⁴ Thus, the U.S. judiciary has erred by failing to accord any importance to the husband's legitimate interests in procreation within marriage, and in the potential life of his unborn child. It may be concluded, therefore, that there is along way to go before U.S. courts can be said to have truly achieved the perfect balance between a pregnant woman's right to personal autonomy and privacy and her spouse's interests in procreation.

There is a lot that needs to be done to make use of all that has already been done. In other words, the move forward in the direction of reproductive rights becoming a reality is very slow in India.



There is a lot that needs to be done to make use of all that has already been done. In other words, one cannot deny that there are policies and schemes in place to help women; The thing that needs to be done is the proper implementation of it.

Safe abortion is the need of the hour, which begs the question that if abortion is legal then why it isn't regulated. There should be guidelines for not just the women seeking abortion but also the hospitals and doctors rendering medical help. This will not only make sure that there is legal abortion, but also that there isn't sex selective abortion and that the services rendered are safe to the women and that all options are made available to them.

The same holds true for reducing the maternal mortality rate in India. Also, there need to be more infrastructural facilities and medical hands to keep up with the population.

(Endnotes)

1. Assistant Professor, P.E.S. Modern Law College, Pune 411016
2. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The case concerned a challenge to a Connecticut law on the grounds that it violated the right to marital privacy. The Court, in a 7-2 decision, held that although the right to privacy is not expressly protected by the U.S. Constitution, such a right can be read into the Due Process Clause of the Fourteenth Amendment.
3. *In re Quinlan*, 355 A.2d.647 (1976); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, (1986); *Cruzan v. Missouri Health Department*, 497 U.S. 261 (1990).
4. *Griswold*, supra note 1. In this case, the Court invalidated an 1879 Connecticut law that made the sale and possession of birth control devices a misdemeanor.
5. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).
6. Krishna Gupta, women, Law and Public opinion 74 (2001)
7. *Id.*
8. The pro-lifers' stance that fetal life stands on the same footing as that of the mother's, leads to the problematic conclusion that abortions must be prohibited even in situations where the mother's life is at stake, or where the mother-to-be is minor, incapable of bringing up a child, or when the pregnancy is a result of rape. Further, if the pro-lifers' argument were to be accepted, the unacceptable yet inevitable conclusion would be that the use of intrauterine devices or "morning after" pills, which prevent implantation of the embryo in the uterus after conception, is tantamount to murder. See *otish. Stephens et al.*, *American constitutional law* 667 (2003).
9. 410 U.S.113 (1973).
10. However, the decision in *Roe* was not in tandem with American public opinion of the time. The judgment was subject to widespread criticism to the extent that the judges who delivered their opinion in the case received hate mail and death threats. The conflict continued into the 1980s, as is reflected by the fact that in 1983, the U.S. Senate defeated by only a single vote, a constitutional amendment which provided that the right to abort is not guaranteed under the American Constitution. See *STEPHENS* supra note 51.
11. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.747,779(1986); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912 (1992).
12. *craigr. Ducat*, constitutional interpretation: rights of the individual 763 (2003).
13. *Roe*, supra note 4, at 154.
14. *Roe*, supra note 4, at 114.
15. *Casey*, supra note 54, at 840.
16. *Id.*, at 837.
17. See *INDIAN PENAL CODE*, 1860, S. 312.
18. See *M.T.P. Act*, S. 3.
19. *A.I.R.* 1983 P. & H. 252, 253.
20. The Delhi High Court reached a similar conclusion in the more recent case of *Sushil Kumar Verma v. Usha*, *A.I.R.* 1987 Del. 86.
21. *Priyaranjan Kumar Shukla*, *Woman's Right to Abortion at Legal Crossroads* 19 (3-4) *IND. BAR Rev.* 89, 95 (1992).
22. See, e.g., *Roe*, supra note 4; *Planned Parenthood of Southern Pennsylvania v. Casey*,
23. See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, supra note 10; *Bellotti v. Baird*, 428 U.S. 132 (1976).
24. *Danforth*, supra note 10, at 2843.
25. *Bellotti*, supra note 66.
26. See, e.g., *Planned Parenthood v. Ashcroft*, supra note 10.
27. See *Casey*, supra note 54, at 893; *Danforth*, supra note 10.



28. V. Krishnan v. G. Rajan, MANU/TN/0279/1993.
29. In arriving at its decision, the Court held that Article 21 of the Constitution encompasses the right to privacy, which is subject only to “reasonable restrictions.”
30. J. Lewis and Jon O. Shimabukaro, Abortion Law Development: A Brief Overview, congressional research service, January 28, 2001, available at http://www.policyalmanac.org/culture/archive/crs_abortion_overview.shtml (last visited March 21, 2018).
31. See Indian Penal Code, 1860, S.312.
32. Strangely enough, the obvious demographic concerns which led to the passage of the M.T.P. Act find no mention in its objects and reasons clause. See generally Shilpa Phadke, Pro-Choice or Population Control: A Study of the MTP Act, 1971, available at http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/repro/MTP_act.html (last visited March 21, 2018.)
33. As per Malthus, population increases by geometric progression, while food supplies increase by arithmetic progression. Therefore, according to the Malthusian model, human deprivation is the inevitable result if population growth is left uncontrolled. See T. Robert Malthus, An Essay on the Principle of Population as it Affects the Future Improvement of Society, with Remarks on the Speculations of Mr. Godwin, Mr. Condorcet, and Other Writers, The Library Of Economics And Liberty (available at <http://www.econlib.org/library/Malthus/maIPop.html> (last visited March 21, 2018.)
34. It may be noted, however, that this opinion may not hold good in a rigidly patriarchal society such as India. In the Indian context, the requirement of spousal notification could conceivably result in coercive decision making, with the woman being denied any say in the matter.