A COMPARATIVE STUDY OF REPRODUCTIVE FREEDOM IN INDIA AND THE U.S.

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ABSTRACT

Reproductive autonomy is a contemporary legal issue in the United States since the number of years. However reproductive right is yet to perceived as a fundamental right under the Indian Constitution. In the light of this bereft point of convergence on the contention of reproductive liberty in India, this paper analyse the Indian attitude with that of the U.S., with respect to judicial approach and State strategies. It perceives the topic from the viewpoint of legal point in question in regard to reproductive freedom, as abortion and forced sterilization that are similar in India and USA, in spite of their diverse social and cultural background. This study throws light on how a vast difference between the two countries on the point of reproductive freedom has led to the evolution of various legal rules regarding reproductive autonomy.

INTRODUCTION

The main confrontation in the field of civil liberties is to maintain the balance between individual liberty and similar but conflicting, interests of the community. This difference has led to the rise of two important schools i.e. Libertarianism and utilitarianism. According to former one the state cannot hinder the personal liberty of individuals unless and until it interferes the rights of other individuals[1] according to the latter one the state should work for the benefit of greatest number of people i.e. "the greatest good of the greatest number"[2] and thus gives priority to the will of the society.

This paper discusses the difference between the two theories regarding reproductive autonomy.[3] Indeed, illustrations of procreative freedom dialect about maintaining equilibrium between individual interestedness and contrary societal concern. The issue related to abortion in USA for example agitate the different views of devotional surmise of society and community concern in saving promising life on one hand and females freedom regarding reproductive right[4] on other hand. Correspondingly, forced sterilization is actuated by the hope that society concern is given more importance than individual liberty regarding reproductive choice. On one hand, libertarian school will support individual autonomy while on the other hand utilitarian school is more concerned for the society.

In India, the discussion related to procreative freedom has been the contemporary legal issue in the wake of latest progress, which imitate the basic jurisprudential contention, as in USA.[5]

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[1] Henry David Thoreau conveyed the spirit of the philosophy best when he said,
"the government that governs best, governs least" Henry David Thoreau, On the Duty of Civil Disobedience.

[2] Jeremy Bentham utilitarian theory(jurisprudence)

[3] Author relate reproductive right as one of the right provided under constitution under the head of personal freedom, where one has discretion of their reproductive autonomy concerning whether they want to have children or not and if yes than also regarding number of children

[4] Roe v. Wade, 410 U.S. 113.

[5] In the case of Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, person was disqualified for contesting election for sarpanch for violating two child norm which was against population control. similarly, in US during a legal discussion, issue of reproductive freedom was raised and the main focus was to maintain balance

Regrettably, the point in question lurking procreative freedom altercation have not been honoured by Indian courts. On the other hand, discussions on reproductive freedom has been the topic of discussions since time immemorial in western world as in USA, which afford the paramount analogous standard for appraising Indian position as contrast to other counties. The Indian courts have often referred the interpretations made by American judiciary because of frequent public debates and unconventional constitution[6] and thus the comparison between the two is valid unto some extent. Therefore, the core of this project is on contrastive study on anomalous approach of judiciary, executive related to procreative choices in India and USA.

The first chapter of this paper explores to analyse whether and to what extent, the Indian and US constitution observe the procreative freedom. It relates the reproductive autonomy with the rights guaranteed by the constitution of both the countries and will also emphasize the importance of recognition required to be given to reproductive right under the head of right to privacy. The second chapter of this paper will emphasize the state approach in India and USA relating to abortion, compulsory sterilization and pre-natal diagnostic technique act. The third chapter shapes the principal core of this space which investigate to provide distinguishing judicial attitude to reproductive liberties in two countries and will focus on area related to abortion and forced sterilization. The discussions held in USA having substantial importance in India are only dealt in this paper and the other debates which do not carry any importance with regard to Indian approach are not dealt here.

CONSTITUTIONAL OUTLOOK ON REPRODUCTIVE DISCRETION

Any procreative decision is a choice having an immediate effect on the person(s) concerned. Like marriage and different parts of family life, which limitedly affect the group, it is a range

between individual and community interest. the court held law does not violate reproductive autonomy of individuals.

[6] Refer to, Gobind v. State of M.P., A.I.R. 1975 S.C. 1379; the court held that right of personal liberty which can be characterized as fundamental right is not absolute.
Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295.In this case it was held that expression life was not limited to bodily restraint or confinement but something more than mere animal existence.

usually left to singular basic leadership. In this way, by its extreme nature, the privilege to procreative decision is a part of the privilege to protection or the "right to be not to mention."

None of the constitution i.e. Indian or U.S. expressly perceives the privilege to reproductive decisions or even the more extensive idea of the privilege to protection. In the U.S., the privilege to security has accomplished established status on the ground that it is one of the components of "freedom" ensured by the Due Process Clause.[7] U.S. courts have translated the privilege comprehensively and have extended it to cover various different rights.[8] After the Supreme Court's judgement in Griswold v. Connecticut,[9] it is presently all around settled in American sacred law that the privilege to privacy is sufficiently wide to shield procreative decisions from nonsensical State obstruction. In consequent judgements, courts have refuted necessities of parental assent, partners assent and so on. In premature birth laws on the grounds of infringement of the privilege to privacy.[10] Thus, in current times, the acknowledgment of the privilege to protection or the privilege to regenerative decision is not any more a subject of debate.

Article 21 of the Indian Constitution, which is identical to the Due Process Clause in the U.S. constitution, utilizes the expression "individual freedom" rather than "freedom." The composers of the Indian Constitution planned to limit the assurance managed by the arrangement to just certain sorts of freedoms identified with the life and individual of a person." Nevertheless, the Supreme Court has translated the expression "individual freedom" in a wide way to incorporate distinct liberties that have been allowed under Article 19 of the

[7] Refer, Griswold v. Connecticut, 381 U.S. 479 (1965). The case was regarding the law which prohibits any person from using any drug medicine article or instrument for the purpose of preventing conception. The supreme court by 7-2 majority invalidated the above law and held that even though the right of privacy is not expressly protected by US constitution such right can be interpreted from due process clause which includes right to marital privacy.

[8] 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).

[9] Griswold, supra note 7. In this case, the Court invalidated an 1879 Connecticut law which prohibited the use of any drug or instrument for preventing conception.

[10] Planned Parenthood v. Casey 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979) in this US supreme court held that teenagers do not have to secure parental consent.

Indian Constitution. However, in its initial judgement, for instance, in Kharak Singh v. Territory of Punjab,[11] the Apex Court declined to decipher Article 21 to incorporate the privilege to liberty, in light of the fact that it is not explicitly given by the Constitution. However, the SC dissented from the above view in further cases, and the right to privacy came to be recognized. In Gobind v. Province of M.P. Mathew, J.[12], after considering the US law on the point, made right to privacy1an important fundamental right. Furthermore, it was held that ant restriction on fundamental Rights will be valid only if it is in the interest of the State. Thus, high parameters have been set for any impediments on fundamental rights to be valid.

By the mid-nineties, the acknowledgment of the right to privacy as a major right was not any more disagreeable[13] . Infact, the goal was to recognize the extent of rights. As per the test laid down in Gobind's case, the court in R. Rajagopal v. Territory of T.N.,[14] `laid down the exceptions to the rule of right to privacy.[15] the rule developed by the court was that the right to privacy is lost if it is in contravention to public security.

Therefore, the restrictions imposed by the state should be analysed. Currently the contention is between right to privacy and other rights. Regardless of the fact that right to privacy has been incorporated under article 21, courts have not given them equal importance as other fundamental rights. The privacy rights has been given secondary treatment by the courts with respect to other rights.

[11] Kharak Singh, *supra* note 6.

[12] Gobind, *supra* note 6.

[13] R. Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264;
Saroj Rani v. Sudarshan Kumar Chadha, A.I.R. 1984 S.C. 1562.

[14] A.1.R.1995 S.C. 264.

[15] The court confronted with the issue of right to privacy with the freedom of press. the court held that a person has right to safeguard privacy of his own ,his family, marriage ,procreation, motherhood and education among other matters .no one can publish anything concerning the above matter without his consent whether truthful or otherwise except that if any publication of such matters are based on public record including court record it will be unobjectionable .if the matter becomes a matter of public record than no more right of privacy exist and it becomes legitimate subject of comment by press and media.

The method of reasoning is by all accounts that the right to privacy is not expressly specified in the Indian Constitution. The Constitution does not concede to any chain of importance between Fundamental rights. In this manner, once a right has been brought on the same footing as the other fundamental rights, it cannot be treated subordinate to any of the fundamental rights. Thus, subordinating the right to privacy to other basic rights, simply in light of the fact that its inception lies in various judgements of the courts, has no basis in Indian law.

Another significant point is that the courts in India have accepted that right to privacy is an aspect of Article 21, its acknowledgment is assailed with legitimate challenges. In Kharak Singh v. State of U.P.,11 a six judges bench held that right to privacy is not protected under article 21, which is yet to be overruled by a larger bench. Besides, all judgements that have accepted this right have been given by smaller benches which doubts the validity of this judgement.

Article 21, which would be at threat if the information was kept secret, and the marriage was consummated. The Court held that the fiancée's right to a healthy life supersedes the right to privacy. In the case of Sharda v. Dharampal, A.I.R. 2003 S.C. 3450, the issue was whether a court directive ordering the medical examination of a spouse in divorce proceedings based on the grounds of mental unsoundness, is violative of the right to privacy. The Court formulated the dispute as a conflict between the statutory right of an individual to seek divorce on the grounds of mental unsoundness and the privacy right of the spouse directed to undergo medical examination.

Additionally, in the case of Javed v. Territory of Haryana, the Court did not explicitly dismiss the conflict that Article 21 incorporates the privilege to conceptive decisions. Rather, the Court held that although it had a wide interpretation yet reasonable restriction has to be imposed as per the interest of the community. The ambit of right to privacy in India can be extended over to the reproductive rights however, the final determination is yet to be delivered by Supreme Court. Would be drawn against an individual refusing to undergo medical examination under such circumstances.

STATE APPROACH AND INCLINATION TOWARDS PROCREATIVE FREEDOM

A. State Approach in the U.S.

Huge numbers of the issues including conceptive rights that have been bantered at the strategy level in the U.S., are yet to be tended to in India. The correlation of State arrangement towards conceptive rights in the two nations would be most reasonable and powerful from the viewpoint of premature birth, since this is an issue that has been generally examined in the two nations.

Earlier U.S. allowed abortion with the consent of women however during the rise of American civil war there was a strong protest against abortion in which Christian lobbyist held the view that life begins at the stage of conception. This difference between the church and the state gave rise to banning of abortion in 1965.

The historical background of premature birth law in the U.S. recommends that State mediation has been spurred basically by the campaigning of religious gatherings. States have likewise interceded on the grounds of wellbeing concerns, that is, the comprehension that foetus removal, if unlimited, could represent a risk to the life of mother or child under certain circumstances.[16]

The progressive move to the authorization of abortion from there on was an aftermath of extraordinary battling by vocal women's activist. In the U.S., along these lines, premature birth has principally been seen as an activity of a lady's entitlement to individual freedom. This privilege got legal acknowledgment in 1973, when the Supreme Court negated hostile to abortion laws on the ground that such laws disregarded a lady's entitlement to conceptive decision, which was natural in her entitlement to individual freedom.

[16] Refer K. GUPTA, WOMEN, LAW AND PUBLIC OPINION 86 (2001)

B. State Approach in India

(i) Abortion

In India, foetus removal is a criminal offense, according to the arrangements of the Indian Penal Code, 1860.[17] In the year 1971, Parliament passed the Medical Termination of Pregnancy Act ("M.T.P. Act"), which is an exemption to section 312, Indian Penal Code, and allows abortion where the continuation of the pregnancy will cause "grave damage to mental or physical wellbeing." Interestingly, the clarification to the area gives that the anguish caused by a pregnancy coming about because of the disappointment of family arranging strategies constitutes "grave damage to psychological wellness" for the motivations behind the Act. Surprisingly, this clarification applies just to wedded ladies, and does not perceive the anguish caused to an unmarried lady by an undesirable pregnancy. This demonstrates the Act was spurred not by libertarian beliefs but rather by the need to advance fetus removal as a family arranging tool.[18] Hence, the restricted authorization of premature birth in India was increasingly an aftermath of Malthusian feelings of dread among arrangement producers.[19] Further, the Act does not leave the choice to abort with the lady. "The consent of the medical practitioners is a pre requisite for this provision.[20] This substantiates the contention that the Act was not imagined as a device for ladies to control their regenerative decisions. Rather, the Act gives the veto energy to a third individual, the therapeutic expert. Along these lines, premature birth laws in India mirror that approach producers think about foetus removal as a device for controlling populace development, instead of an outflow of a lady's entitlement to control her body.

[17] Refer INDIAN PENAL CODE, 1860, S 312.; S 313

[18] M.T.P. Act does not mention demographic concern in its objects and reasons clause. Refer Shilpa Phadke, Pro-Choice or Population Control: A Study of the MTP Act, 1971.

[19] As per Malthus, human population grows exponentially (i.e. doubling with each cycle) while food production grows at an arithmetic rate i.e. by repeated addition of uniform increment in each uniform interval of time) to avoid such a catastrophe Malthus emphasized on control of population growth. Refer to AN ESSEY ON PRINCIPAL OF POPULATION by T. Robert Malthus.

[20] Refer http:// www.guardian .com/India mass sterilization. The effects of the mass sterilization programmes carried out in Chhattisgarh India went horribly wrong and women were forced by health workers to attend the camp, more than 80 women underwent surgery and around 60 fell ill and were in very serious condition. Criminal complaint has been filed against doctors and officials. [as per data in India between 2003-12 a total of 1434 people died of unhygienic sterilization procedure].

(ii) Forced Sterilisations

Another impression of this against libertarian state of mind Of Indian arrangement creators, was the strategy of necessary sterilization, implemented amid the 1975 Emergency. Many State Government instituted laws to give legitimate support to mandatory sterilization. The Punjab Government, for example, passed a law making it an offense to have more than two children.[21] This was in barefaced infringement of the regenerative self-sufficiency of people.

The pre-emergency attitude of the Government regarding sterilization has remain unchanged. For e.g. government is still funding Panchayat for sterilization approaches. Reproductive self-governance is in this way, successfully diminished by the vast majority of India's populace strategies. That the Central Government in the year 2003 endorsed a "focused on" way to deal with populace control, whereby States would be required to accomplish cleansing targets, additionally substantiates this point. These strategies totally slight the privilege to conceptive decisions, and benefit State enthusiasm for populace control over individual self-governance, in consonance with a utilitarian way to deal with State activity.

(iii) Pre-Natal Diagnostic Techniques Act

Another institution that hurls issues of conceptive rights is the Prenatal Diagnostic Techniques Act, 1994 ("P.N.D.T. Act"). This Act disallows sex assurance procedures in perspective of societal worries over female foeticide.[22] While the administrative aim is commendable, the methodology conceived for the accomplishment of the objective might be liable to feedback.

By and by, the State has infringed upon the private domain of regenerative decisions keeping in mind the end goal to serve a social goal, this time, with no genuine advantage to society.

[21] Mohan Rao, In Whose Interest? THE HINDU, August 31, 2003, as per guidelines of government of India Tamil Nude government is implementing the increased rate of compensation to the sterilization acceptance for the sterilization done in govt institution and private hospitals.

[22] Statement of Objects and Reasons, P.N.D.T. Act, 1994, available at http:// mohfw.nic.in/ PNDT. Available at https://vidhilegalpolicy.squarespace.com/s/Report_Suggestions-on-Amendments-to-the-PCPNDT-Act.pdf.

ANALYZING JUDICIAL INCLINATION IN US AND INDIA RELATED TO REPRODUCTIVE INDEPENDENCE

Out of many matter of contention discussed inside the conceptive rights structure in the U.S., foetus removal and forced sterilization are of unique importance to the Indian setting. In this manner, these issues frame the focal concentration of this Section, which looks to give correlation of judicial approach w.r.t. reproductive autonomy in two nations.

A. Abortion

The point in question related to abortion has been fervently in the U.S. since the mid-seventies. The two conflicting interests relating to abortion talks about mother's interest in respect to her individual freedom and protection and the interest of developing infant. The main supporters of anti -abortion groups primarily comprise of Catholic Church, universal Jews and fundamentalist Protestants.[23] They declare that human life starts at the phase of origination and subsequently contend that the hatchling qualifies as an established individual getting a charge out of the privilege to life under the American Constitution. Their postulation in this way, is abortion, which disregards the baby's entitlement to life, and which completely resembles murder.[24]

The US courts have faced catena of cases related to abortion and there has always been a contradiction between individual interest and state interest.

In roe v wade[25] US SC gave the judgement contending that foetus do not possess right to life[26] however it made all abortions illegal except one endangering women's health. Moreover, SC qualifies that right to abort can be protected under right to privacy.

[23] Krishna, *supra* note 16

[24] The pro-lifers' states that use of medicines and devices which prevent implantation is not acceptable as the foetus has same right of life as that of mother irrespective of the physical mental and financial condition of mother.

[25] 410 U.S. 113 (1973).

[26] 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.

The wide pattern in the U. S. after the judgement in Roe has qualified individual freedom and self-sufficiency, and the related personal autonomy, over the concerns of the State. In spite of the fact that in Roe, the Court held that there is no total ideal to protection, it additionally pronounced that this privilege is a crucial one, along these lines preparing for strict examination of government controls identifying with foetus removal.[27]

The court tried to maintain equilibrium between the individual and state interest by establishing trimester frame. In the first trimester, individual autonomy was given preference over the state concern. On the other hand, in the second and third trimester state concern was given primacy.

Strangely, faces off regarding fixated on the privilege to prematurely end have been to a great extent defunct in the Indian setting. What might be mixed up as societal detachment grows from the way that extremist gatherings can discover little blame with the Indian State's tolerant approach towards premature birth. In spite of the fact that the M.T.P. Act is in the idea of an exemption to the general denial against foetus removal under the Indian Penal Code, the grounds on which it licenses premature birth are broadly worded. The American professional premature birth battle was started off by a troublesome State arrangement towards foetus removal. Since the Indian State has been in favour of abortion because of its statistic concerns, a crusade against foetus removal laws was never the key motivation for women's activist or other dissident gatherings in India.

To the extent the legal demeanour is concerned, it must be noticed that numerous aspects of regenerative rights, for example, surrogacy or forced sterilization that have caught consideration in the U.S. are yet to be bantered in Indian courts. In any case, the state of mind of the Indian legal to one side to regenerative decisions might be gathered from choices that have managed issues, for example, abortion in divorce cases.

B. Involuntary Sterilization:

Sterilization in the U.S. is of unique significance, since India has a long history of forced sterilization programs. The idea of State intercession in abortion and in forced sterilization are

[27] WICKIO.WITTENSTEIN, REPRODUCTIVE RIGHTS "WHO DECIDES?"(2016).

be that as it may, to a great extent divergent. While State impedance in foetus removal is said to spring from its interests in the security of maternal wellbeing and "potential life", sterilization is spurred by worries as different as eugenics[28] and populace control. Forced sterilization is maybe the most serious infringement of reproductive rights, for it irreversibly affects the privilege to conceptive decisions, which is not the situation where a confinement on the privilege to prematurely end is concerned.

CONCLUSION

The U.S. judiciary's demeanour towards regenerative rights has experienced an uncommon change in the last 50 years. In a series of choices, starting with Roe, the tight standpoint in Buck was deserted for a more liberal stand. Nonetheless, it is guileless to trust that the U.S. courts have accomplished the ideal adjust of interests in issues including regenerative self-sufficiency, for example, premature birth, and constrained disinfection. For example, while there is much to be acknowledged in the present position that the prerequisite of spousal assent for fetus removal is illegal, the contention that even spousal notice is a nonsensical limitation on a lady's entitlement to individual self-sufficiency, is by all accounts imperfect. All things considered, be that as it may, it can be reasoned that the U.S. way to deal with regenerative rights is predicated on libertarian convictions and beliefs.

These better focuses, nonetheless, appear to be of little significance when contrasted and the Indian position. At the very beginning, it must be noticed that popular assessment, the Press and other societal organizations in India, have not so much clamoured for the acknowledgment of conceptive rights. Further, our judges are yet to completely perceive conceptive self-governance as one of the key parts of the privilege to individual freedom. The approach of the Indian legal has dependably been to benefit group interests over individual self-governance and security development through premature birth laws and populace strategy. Despite the fact

[28] Eugenics believe in the possibility of improving the quality of human species or human population by discouraging reproduction of person having genetic defect. These beliefs have evaporated with enhanced scientific understanding of genetics. Refer Lutz Kaelber, Associate Professor of Sociology, and University of Vermont Presentation about "eugenic sterilizations" in comparative perspective at the 2012 Social Science History Association.

that the essential rationality directing State activity and legal declarations is clear, the region of conceptive rights in the Indian setting stays one of perplexity and logical inconsistencies.

There is a requirement for legal or authoritative intercession to illuminate the numerous lawful issues included. The protected status of conceptive rights or the more key appropriate to security, for example, is a cloudy issue even today. Similarly squeezing is the need to sharpen the governing body and the legal to the way that conceptive decisions are close to home decisions with which the State must not meddle gently. In such manner, Indian arrangement creators and judges have much to gain from the development of regenerative rights in the United States. The test lies in guzzling the soul behind the acknowledgment of conceptive rights, and applying it to tackle the social and lawful problems unconventional to India.

The Indian legal has been perceptive of, and affirmed of the State's statistic concerns. This is all around delineated by the current choice in Javed. Indian Courts and approach producers have reliably declined to perceive that despite the fact that the objective of constraining populace development is an authentic one, there is little defence for encroaching on a flexibility as key as the privilege to reproduce, with a specific end goal to accomplish this end. There is requirement for the Indian State to investigate other options to sanitization, for example, training about family arranging techniques, proficiency and ladies' strengthening. Kerala is a striking case of the way that such a coordinated approach, which adjusts regenerative rights with the objective of populace control, can be a success.[29] In general investigation, State arrangement and legal dispositions in India might be portrayed as utilitarian, looking to accomplish group premiums in lessening populace development through premature birth laws and populace strategy. Despite the fact that the essential rationality directing State activity and

[29] Kerala has the highest sex ratio among all States at 1084 females for 1000 males, as of 2011. In fact, it is the only Indian State with more females than males per 1000. Since 1981, it has consistently registered the lowest growth rate of population amongst all Indian States. For instance, in the decade from 1991-2011. CENSUS OF INDIA, 2011, available at http://www.censusindia.net/profiles/ker.html.

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