

RIGHT OVER THE WOMB v. RIGHT OF UNBORN CHILD: A COMPARATIVE STUDY OF ABORTION LAWS IN INDIA AND U.S.A

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Introduction

The ability of women to bear new life places her in both advantageous and disadvantageous position. A woman's womb has been a centre of great debate in the background of reproductive rights. The issue of abortion is one of the most controversial reproductive rights. The issue turns to whether women have the right to terminate a pregnancy. There are many legal restrictions imposed on abortion. Evidence demonstrates that these restrictions do not reduce the number of induced abortions in practice; rather they contribute to higher rates of unsafe abortion.¹ Roughly 13% of all maternal deaths worldwide are because of unsafe abortion.² There are two terms associated with abortion-- pro-choice and pro-life. On the one hand, pro-choice campaigners contend that abortion falls within a person's constitutional right to privacy, deeming that choice to terminate an unborn child lies with the mother of the child and her doctor. Conversely, pro-life campaigners contend that a foetus is a living being at the moment of conception that abortion should be criminalized in a view to guard the life of the unborn child.

In the paper, the researcher, as the title suggests, will make a comparative study of the abortion laws of USA and India, looking into the statutes and the important cases. The paper will look into the concept of abortion and the issues related to it in context of the two countries and with the help of the philosophical opinions underpinning these two divergent views. The researcher will bring about light in the centuries-old societal expectations of a women's womb 'to do its job'. This paper will enter into the debate from a legal point of view. The paper shall also make a humble attempt to pen picture the various societal constructs that are important in determining

¹ Department of Reproductive Health and Research, *Unsafe Abortion: Global and Regional Estimates of the incidence of unsafe abortion and associated mortality in 2008*, WHO (2011)

² *Id.*

the *law as it is*, in both these countries.

Literature Review

- K.D. Gaur, *Abortion and the Law in India*, XV Cochin University LR, 123-143, (1991)

In this journal the author analyses abortion with respect to the prevailing law in India. He probes into the provisions in the IPC regarding abortion in India specifically Sections 312 to 316 of the Code. He explores the inadequacy of law to protect illegal abortions and paints a palpable picture about the woes of the mothers who resort to backstreet abortions and the complications arising out of such abortions. He explicates how the law that exists to protect the people can cause harassment in such cases of abortion. He illuminates the steps taken by the Government to make the abortion laws more liberal and casts light on the MTP, Act.

The author has provided the researcher with a helpful gloss on the subject matter of abortion and law in India with relevant case laws for better understanding. The author has helped the researcher in adopting an unconventional perspective and realizing the importance of the role of law in protecting the women's right especially the right to privacy and the threat of increasing population and importance of family planning.

- Simi Rose George, *Reproductive Rights A Comparative Study Of Constitutional Jurisprudence, Judicial Attitudes And State Policies In India And The U.S* 18(1) S.B.R (2006)

The authoress in this article examines reproductive rights from a jurisprudential attitude and gives a comparative analysis of the laws existing in India and the U.S regarding the reproductive rights existing in both the countries. The article seeks to shed a light on the impact of social attitudes and how a difference of the social attitudes can contribute towards shaping the legal issues differently in two countries. She gives a crisp detail about the law existing for abortion.

The authoress further gives a comparative analysis of judicial attitude towards the reproductive right in the two countries. Abortion has changed drastically in the U.S while in India there is still lack of development and awareness. The article has enlightened the researcher to realize how religious beliefs play a role in every aspect of implementation as it did in case of U.S a long time ago. The article has aided the researcher in attaining a better understanding of the reproductive rights and has

provided the researcher with sufficient information regarding the research topic of concern.

- Debadyuti Banerjee and Ujwala Uppaluri, *From Roe v. Wade to Foetal Pain Legislation: A Reflection of American Jurisprudence on the Indian Milieu of Liberalised Abortion Policies*, 2 NUJS L. Rev. 637 (2009)

This article talks about how the recognition of abortion laws is credited to the United States and their judiciary. The issues of abortion are being discussed in this paper, highlighting factors related to the existential question of 'right to life' and the normative value for human life. The very fact of abortion itself is inhuman and has also examined how the people conducting the abortion are affected.

The situation of abortion of both in the past and the present have been discussed with the help of case laws with provides criticism and landmark decisions to the laws towards abortion as a whole. In this paper, certain Acts and sections have been explained which gives a synopsis of abortion and the need for a just legislation toward abortion law.

Scope and Aims

The aim of this paper is to bring light to the tussle between a woman (who demands right over her body) and foetus (who has not taken birth). The paper will give the comparative analysis of the abortion laws in both India and U.S.

The scope of the paper is to study the abortion laws and how it evolved in USA and India and make a comparison study in respect of these two countries.

Research Questions

In order to achieve the objective of this project, attempts have been made to answer the following questions –

- What are the philosophical opinions relating to abortion?
- How is the law relating to abortion different in India and USA?
- What are the societal constructs that are important in determining the *law as it is*?

Research Methodology

In this paper doctrinal research was involved. This is a qualitative research. Books and research papers related to this topic has been heavily relied upon as secondary sources of information.

Concept of Abortion

Abortion as a word has been derived from a Latin term '*abortus*' which means an object which has been detached from its proper site. This means that abortion is an act of giving premature birth, especially the expulsion of human foetus prematurely at any time before it is viable or competent of nourishing life.³ As per the Black's law dictionary⁴, abortion means, 'The artificial or spontaneous termination of a pregnancy before the embryo or foetus can survive on its own outside a women's uterus.' Simply it means that the child in the womb of the mother is not allowed to come out in the world. In medical language, abortion is the termination of pregnancy prior to the foetus attaining the stage of viability.

Abortion brings about a lot of debate. The moot point of abortion is right over the womb versus the right of the unborn child. The debate is whether the mother carrying the child has right over the unborn child. Those in favour of abortion support the woman's right to decide whether to have a baby or not they are known as pro-choice campaigners. Then again those who stand against consider the right to life of the unborn child and are called pro-life campaigners. The tussle is between a woman (who demands right over her body) and foetus (who has not taken birth). There are also a lot of controversies relating to this as the subject involves social, religious and moral judgments on which the opinions differ strongly.

As per the census, in 2013, 97 percent of country legalized abortion to save the life of women. Two-thirds of countries legalized abortion in which the mental or physical condition of the mother was in danger. In cases where the pregnancy resulted from rape or incest or foetal impairment, abortion was permitted. Approximately one-third of countries legalized abortion for economic or social reasons.⁵

Depending upon nature and circumstances under which abortion occurs, abortion can be divided into three different classifications i.e. spontaneous or natural abortion, therapeutic abortion and criminal or induced abortion. Natural or Spontaneous abortion is an abortion that results because of some diseased state in the mother or the foetus or that is formed inadvertently by some other reason. Therapeutic abortions are induced by a qualified medical practitioner in

³ JAISING P MODI, MEDICAL JURISPRUDENCE AND TAXICOLOGY 332 (1955)

⁴ HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY (2nd ed. 2010)

⁵ United Nations, Department of Economic and Social Affairs, Population Division. *Abortion Policies and Reproductive Health around the World*, UN publication, Sales No. E.14.XIII.11 (2014)

good faith when he contends that the pregnancy, if continued, will jeopardize the life or affect the health of the mother and also when he is satisfied that the pregnancy will lead to the child, if born, mentally or physically handicapped. Lastly, criminal or induced abortions are abortions caused by premeditated intervention with pregnancy in cases that do not provide a validation for such intervention.

Philosophical Positions

The tussle is between a woman (who demands right over her body) and foetus (who has not taken birth). There are a plethora of philosophical opinions underpinning these two divergent views.

Ronald Dworkin has comprehensively researched on the problem of abortion and according to him, a foetus has no interest prior to the third trimester.⁶ He expresses that 'not everything that can be destroyed has an interest in not being destroyed'.⁷ He writes that a foetus can only feel pain in the late pregnancy as its brain is developed to feel the pain, but before, as the brain of the foetus is not sufficiently developed the foetus cannot feel pain. The scientists have approved that the foetal brain will feel pain for about the twenty-sixth weeks.⁸ Therefore, he writes that something that is not alive has no interest and once the foetus can live on its own, only then can it have interests. According to Aristotle's Potentiality Principle⁹, as foetuses and embryos have all the quality that they will have as full persons afterwards in life, they should not be killed. As it is iniquitous to take the life of an adult human being because he has a certain property, it is iniquitous to kill a foetus who will take the property later.

W. N. Hohfeld talks about every right having a correlative duty. Duty is that one must not intervene in others right. In case of a mother and unborn child, their right contradicts with each other as mother's right to abortion reduce the unborn child's right to life.¹⁰ The dilemma that makes us wonder here is whether the unborn child posses any right and if yes then is the right more important than the right of the mother? We will understand this in the coming chapters

Societal expectations

⁶ RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 90 (1999)

⁷ *Id.*

⁸ CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES 13 (1988)

⁹ Lynn M Morgan, *The Potentiality Principle from Aristotle to Abortion*, 54 *supp.7* The University of Chicago Press Journals (2013)

¹⁰ Swati Bajaj & Vikram Seth, *Unborn Right to Life Vis-a-vis Women Right to Abortion: Legal Reflection*, 2 *issue1* JLSR, 127 (2016)

In some places, women are 'expected to do their job' by producing children. They are considered to be 'child producing machine' and are expected to give birth only to a male child.¹¹ At the same time, women are only respected in many places because of their ability to reproduce.

As we will read further, right to life includes right to procreation and it further comprises of the right to have to manage the reproductive organs. Therefore, the right to give birth also gives the right to abortion.

Abortion Laws in the USA

Abortion has been highly debated in the USA since the early seventies. The two points of the debate are the pro-life campaigners and pro-choice campaigners. The debate is whether the mother carrying the child has right over the unborn child. Those in favour of abortion support the women's right to choose whether to have a baby or not they are known as pro-choice campaigners. Alternatively, those who stand against consider the right to life of the unborn child and are called pro-life campaigners. The pro-life campaigners are anti-abortion groups consisting of those who are guided by religious beliefs and include the Catholic Church, fundamentalist Protestants and Orthodox Jews.¹²

When we talk about abortion, the origin of the abortion law was in the early 1800's in the U.K., however, the acknowledgement of transfiguring of the laws of abortion and acknowledging the right and women's freedom on their bodies can be given credit to the U.S. and particularly to their Judiciary.¹³ Looking at the history of abortion laws in the U.S; in 1821 the state of Connecticut initially implemented a law on abortion which was similar to that of the Ellenborough's Act of England.¹⁴ In the intervening time, in 1828, the New York passed laws against abortion and treated it as a crime. Additionally, it included and recognized therapeutic abortions as valid.¹⁵ Within time the whole of US had completely banned abortion, apart from cases where the mother's life is at risk. The first state to legalize abortion was Colorado in 1967.¹⁶ In 1840, state of Texas adopted the abortion laws.

¹¹ *Id.*

¹² KRISHNA GUPTA, WOMEN, LAW, AND PUBLIC OPINION, 74 (2001)

¹³ Debadyuti Banerjee and Ujwala Uppaluri, *From Roe v. Wade to Fetal Pain Legislation: A Reflection of American Jurisprudence on the Indian Milieu of Liberalised Abortion Policies*, 2 NUJS L. Rev. 637 (2009)

¹⁴ *Id.*

¹⁵ *Rex v. Bourne*, 3All ER 615 (1938)

¹⁶ See COLO. REV. STAT. ANN 1967

There are many cases relating to abortion laws in the USA. The most important case is *Roe v. Wade*¹⁷ when we are talking about abortion laws in the USA. In this lawsuit, the Supreme Court said that Texas's law makes abortion illegal apart from the need to save the mother's life contravening of the Fourteenth Amendment to the US Constitution and especially the due process clause.¹⁸ The Court said that the phrase 'person' in it does not encompass the unborn child and the question that at what time life commences cannot be contemplated by it.¹⁹ Here, in the case an unmarried pregnant woman, under incognito Jane Roe, on behalf of herself and other women instituted a federal action against the District Attorney of Dallas County, Texas questioning the constitutionality of the Texas Criminal Abortion Laws, where she expressed her intention to have a 'legal abortion' which would be "executed by skilled, qualified physician, under secure conditions"²⁰ and that she wouldn't be able to go to a jurisdiction which permits her to have an abortion of the abovementioned description.²¹

While giving the judgment in the *Roe* case, the Supreme Court looked into the decision of *Griswold v. Connecticut*²² where it was held that although it is not explicitly stated anywhere in the US Constitution but the right to privacy exists and it is sheltered by the Fourteenth Amendment's Due Process Clause. It held that right to privacy was a fundamental right and was advanced to let the women choose whether to abort or not to abort but it also allowed the state intervention where the state had "legitimate" interests i.e. where both the life of the mother and the unborn child were concerned. The Court held that state intervention is justified in the second trimester where the purpose is to protect the maternal health i.e. once the foetal viability is reached, only then can the state intervene. In spite of *Roe* being a landmark judgement, it attracts a lot of criticism. Justice Rehnquist was the first to criticize the judgement of *Roe* after that numerous have questioned the origin of the judgement and the cost of its indistinct disputation.²³

In 1992, another landmark case came up i.e. the *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁴ that upheld the decision given in *Roe*. The Court in this suit did not overrule *Roe*'s case but reiterated and strived to provide novel facet to the right of abortion. In

¹⁷ *Roe v. Wade*, 410 US 113 (1973)

¹⁸ US Supreme Court Reports, 35 *The lawyers cooperative Publishing co.*, at 147 to 199

¹⁹ *Id.*

²⁰ See Justice Blackmun's opinion in *Roe v. Wade*, 410 U.S. 113 (1973)

²¹ Morgan, *supra* note 9.

²² 381 U.S. 479 (1965)

²³ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) and Ruth Bader Ginsburg, *Some Thoughts On Autonomy and Equality in Relation to Roe v Wade*, 63 N.C.L. REV. 375 (1985)

²⁴ 505 U.S. 833 (1992)

this case, the Supreme Court formed a novel criterion to examine the constitutionality of State abortion control which was called the “undue burden” test instead of trimester test. Even while giving this judgement, the court’s outlook was that the constitutional defence of woman’s choice to terminate her own pregnancy is derived from the Due process clause of the Fourteenth Amendment.²⁵ The “undue burden” test has an unfavourable effect on the right to abortion and is commendable of disparagement.²⁶ In comparison to the earlier situation in which the State had to convince for imposing the restrictions, the burden is now on the woman to show that the law places “undue burden” on her reproductive choices. Therefore, the *Casey* decision is a regressive step for the liberal attitude of the US Courts in the context of reproductive rights.²⁷ The decision, in this case, came in the context of Pennsylvania’ state laws that made it necessary for parental or spousal consent if a woman wished to have an abortion.

In 2005, the Unborn Child Pain Awareness Act was introduced by the then US Senator. The Act intends to penalize the physicians if they are unable to inform women of the possibility for foetal pain past 20 weeks’ gestation. There came the Unborn Victims of Violence Act in 2006 which makes it an offence to kill pre-natal human beings²⁸ and in which the State intervention was allowed where the state had a legitimate interest.²⁹

Therefore by examining the cases mentioned and statutes stated, we see that the USA acknowledges the right of women to decide to have an abortion that is included under the right to privacy. There is State intervention allowed but only after the stage of viability. We see that Americans are basically ambivalent concerning the matter of abortion.

Abortion Laws in India

We have established that in the U.S. Constitution, right to privacy is not explicitly cited but has achieved constitutional status through Due Process Clause of the Fourteenth Amendment.³⁰ The U.S Courts have interpreted the right and have comprehended it to defend other rights as well.³¹ Article 21 of the Indian Constitution recognizes right to life and says that “No person

²⁵ Kshitij Asthana, *Medical Termination of Pregnancy Act and the right of women over their own body*, BLOG.IPLEADERS (DEC. 11, 2017, 11:00 AM), https://blog.ipleaders.in/medical-termination-of-pregnancy/#_ftnref28

²⁶ Simi Rose George, *Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the US*, 18(1) SBR (2006)

²⁷ Asthana, *supra* note 25.

²⁸ Unborn Victims of Violence Act, 18 U.S.C. (2006).

²⁹ Susan Sherwin, *The Concept of a person in the context of abortion*, 3(1) J Med Humanit 21-34 (1981)

³⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³¹ *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, (1986); *Cruzan v. Missouri Health Department*, 497 U.S. 261 (1990)

shall be deprived of his life and personal liberty except according to procedure established by law.”³² This Article is complementing the Due Process Clause in the U.S. that incorporates the word “personal liberty” in place of “liberty.” Supreme Court has interpreted the term “personal liberty” in different cases to include the right to privacy. Though, in the case of *Kharak Singh v. State of Punjab*³³, the Supreme Court repudiated to interpret Article 21 to include the right to privacy as it is not explicitly mentioned in the Constitution. Later on in *Gobind v. State of M.P.*,³⁴ it was held that right to privacy is a fundamental right and included in the Right to life. In the *Roe* case, we see that from right to life comes the right to personal liberty and from this right to personal liberty comes the right to privacy from which further right to abortion arises.³⁵ In the recent case of *Javed v. State of Haryana*,³⁶ the court did not deny that Article 21 incorporates right to reproductive choice, but stated that rational limitations may be made compulsory on the implementation of such rights.³⁷

The questions that arise with the right to abortion is that, whether an unborn child should be given the status of a person or not and whether abortion is mother’s right or child’s right to life. In India, where religion is very important, it is believed that abortion is equated with immorality and sin. According to certain religious text, the woman who practices abortion is equated with a prostitute who would be reborn again as a prostitute in the next life.³⁸

The Indian Penal Code (IPC), 1860 is the fundamental criminal law of the country has provisions regarding abortion. At the beginning of 1861, abortion became illegal, apart from saving the life of the mother. This was regardless of whether or not the foetus has attained the stage of viability. The IPC does not explicitly use the term abortion but by legal interpretation, we see that voluntary causing miscarriage is criminal abortion and which is a crime as per the code.³⁹

This miscarriage theoretically refers to spontaneous abortion, whereas “voluntarily causing a miscarriage” i.e. induced abortion that forms the offence under the Indian Penal Code, 1860 stands for criminal abortion. According to the code, induced abortion is a crime under sections 312 to 316.

³² INDIA CONST. art. 2.

³³ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295

³⁴ *Gobind v. State of Madhya Pradesh*, AIR 1975 SC 1378

³⁵ *Roe v. Wade*, 410 US 113 (1973)

³⁶ *Javed v. State of Haryana*, AIR 2003 SC 3057

³⁷ *Id.*

³⁸ KAMLA MANEKAR, ABORTION: A SOCIAL DILEMMA 24 (1973)

³⁹ Upendra Baxi, *Abortion and the law in India*, 28-29 JILI (1986-87).

The abortion law was made liberal in 1971 by the coming of the Medical Termination of Pregnancy Act (MTP). This act intended to make certain exceptions to the stringent provisions of the Indian Penal Code which assert that every miscarriage, abortion is criminal except when they are assumed to save the mother's life. Under this Act, termination of pregnancy can be done by qualified physicians only in good faith and up to 12 weeks and with the opinion of more than two physicians between 12 and 20 weeks. After the completion of 20 weeks, the MTP Act does not allow termination of pregnancy. The validity of the MTP Act was disputed in the suit of *Nand Kishore Sharma v. Union of India*.⁴⁰ According to this case, few provisions of the Act were against Article 21 of the Indian Constitution and immoral. The Court in this suit had to decide when the foetus actually comes into existence and if the foetus's right to life is desecrated by the said provisions. But the Court declined to deliberate when the foetus comes to life or the important question touching upon the principles of abortion, stating that they were "simply concerned with the legality of the pertinent provisions of the Act".⁴¹ The Court did not mention the ascription of the status of a person to the foetus and affirmed the MTP Act to be legitimate and did not go against Article 21. Nevertheless, the Court was indecisive when the question was if MTP Act would be violating Article 21 of the foetus, articulating that it was hard to establish precisely when a foetus comes to life and hence shunned an end on the dispute.⁴²

The MTP Act allows abortion only when it is a threat to the pregnant mother's life, or possesses a threat to her mental or physical health, or when there is a threat of the newborn child with mental or physical problems. The case of *Nikita Mehra*⁴³ is very important when talking about abortion laws in India. The issue in this suit was that whether the limit of abortion must be increased from the presently allowed twenty weeks of gestation to twenty-four weeks or above.⁴⁴ In this suit, the gestation time had progressed forward of the stipulated time and was beyond twenty-five weeks. Here, the petitioners were a married couple and their physician, prayed that the foetus had a congenital heart blockage at a late stage and they articulated the helplessness to suffer the emotional trauma and financial load of giving birth to a child that may undergo serious health issues. The Court stated that even if the petition was made beyond

⁴⁰ AIR 2006 Raj.166

⁴¹ *Id.*

⁴² Banerjee & Uppaluri, *supra* note 13.

⁴³ Dr. Nikhil Dattar & Ors. V. Union of India, (2008) 110 BOM. L.R. 3293

⁴⁴ Banerjee & Uppaluri, *supra* note 13.

20 weeks, the Court wouldn't still have been in favour of the petitioners as the provisions of law under Section 3(2)(ii) read with Section 3(2)(b) would not have been satisfied.⁴⁵

Hence, we see that MTP Act does not allow the pregnant woman to abort at her will, even in the first trimester. Therefore, there is no "abortion on demand". It has been articulated by the Courts that "termination of pregnancy under the provision of this Act, is not the rule but only an exception".⁴⁶ Thus, MTP Act doesn't make abortion legal but sets clear situations in which it is permitted.

Comparison between the outlooks of the two countries

The reason why the comparison between India and U.S has been made as opposed to other country is due to its tremendous public debate and also accruing to the fact that the U.S has been relatively constitutionally and legally advanced with regards to this issue. The fact that Indian Courts often look towards the American Constitutional Jurisprudence for inspiration legitimizes the comparison.⁴⁷

In the U.S though abortion has been legalized at present, however, it was not met with open arms since the beginning. During the beginning of the American Civil War, there were many anti abortion campaigns which mainly had Christian lobbyists at the forefront. These anti-abortion groups consist of those guided by religious beliefs. According to them, "life begins at the stage of conception and hence argues that a foetus qualifies as a constitutional person and enjoys the right to life under the American Constitution."⁴⁸ This resulted in the State banning all the abortion laws. Thus it can be observed how the religious beliefs of the community or interest of the community prevailed over the individual interest. However, abortion was gradually legalized with feminists' movements and was judicially acknowledged by the Supreme Court of U.S in 1973 in the landmark case of *Roe v Wade*.

In contrast in India though the women's reproductive rights are a major legal issue, however, it has not been given as much importance as it should be. Section 312 of the IPC states that whoever causes miscarriage of a woman which is not caused in good faith to save the woman's life is to be detained for a period which may stretch to three years, or with fine, or with both and if a woman causes herself to miscarry shall also fall within the ambit of this section. It

⁴⁵ *Id.*

⁴⁶ Paige Passano, *Manushi: Legal but Not Available, The Paradox of Abortion in India*, INDIA TOGETHER (Nov. 4, 2017, 10:00 AM), <http://www.indiatogether.org/manushi/issue126/abortion.htm>

⁴⁷ Banerjee & Uppaluri, *supra* note 13.

⁴⁸ *Id.*

allows abortion only on medical grounds in order to protect the mother's life i.e. it recognizes the foetus' right to life.⁴⁹ The word 'abortion' has been avoided in the Code which in order to prevent offending the sentiments of the Indian community which shows how abortion is condemned in the Indian society since ages. Before the enactment of MTP Act, the laws were very strict and even though the provisions under the IPC existed it was rarely implemented perhaps due to the fear of revolt from the fanatics and conservative societies. Thus, in both the countries, we see the dominant role religion plays in a traditional bound and a conservative society which has an important influence on the social growth and value orientation of the population.⁵⁰ The MTP Act was enacted in order to liberalize the stringent laws in India which if observed can be seen to have been enacted as a tool for family planning and not as a protection of woes of an unmarried pregnant woman. Further, the act provides a ground on which the abortion can be permitted that is on the satisfaction of a medical practitioner thus justifying the argument how the abortion laws in India do not exist to protect the right of privacy of a woman but as a means of tool for family planning.

The attitude of the Indian judiciary reveals a complete disregard of the pregnant woman's right to privacy, and her right to make independent reproductive choices.⁵¹ The issue surrounding abortion in the Indian Courts is usually that if it would amount to cruelty on the spouse if the wife aborted the child without his consent which is recognized as a ground for divorce.⁵² The U.S. judiciary, conversely, 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.⁵³ 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.

Thus it can be seen how the U.S seeks to protect the reproductive rights of the women in contrast to India where the State does not allow women to freely exercise their reproductive rights and intervenes in their choices placing the privilege of the community like family planning over the individual rights like the choice of women to abort. While the U.S was able to integrate and protect the reproductive rights of women efficiently though it may be flawed in some areas by and large, however, it can be concluded that the U.S. approach to reproductive

⁴⁹ K.D. Gaur, *Abortion and the Law in India*, XV Cochin University LR, 123-143, (1991)

⁵⁰ *Id.*

⁵¹ Priyaranjan Kumar Shukla, *Woman's Right to Abortion at Legal Crossroads* 19 IND. BAR REV., 89, 95 (1992)

⁵² Satya v. Siri Ram AIR 1983 P H 252

⁵³ Roe v. Wade, 410 U.S. 113, 148-150 (1973). And Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 912 (1992).

rights is predicated on libertarian beliefs and ideals.⁵⁴ In India however though the laws regarding abortion have been made legal, the stringent rules still act as an obstacle in fully protecting the right of women and protecting her health. The Indian Judiciary by placing the community interest over individual interest in most of the cases violates the very aspect of the right to privacy under Article 21 of the Indian Constitution and has not been fully able to recognize the reproductive rights of the women.

Conclusion

To conclude, it is crucial that India takes a hard look at its MTP Act and other laws related to abortion. It is admirable that not only is India one of the first countries in the world to legalise abortion, but also its laws do not pander to anyone religious belief but has been made on the basis of practicality. However, what is missing is that the concept of a woman's 'choice' has not been factored in yet (as abortions are conditional and predicated on reasons like the physical or mental health of the mother, a potentially handicapped or malformed child, rape, underage pregnancies, pregnancies in women of reduced mental capability and failure of contraception). Thus, a woman's right to her body is missing in India's laws. Therefore, the need of the hour is to look at the laws and make necessary amendments, making it on par with laws from progressive countries. It is the time that a woman's right to her body is recognized and protected.

Bibliography

Books

- CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES 13 (1988)
- HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY (2nd ed. 2010)
- JAISING P MODI, MEDICAL JURISPRUDENCE AND TAXICOLOGY 332 (1955)
- KAMLA MANEKAR, ABORTION: A SOCIAL DILEMMA 24 (1973)
- KRISHNA GUPTA, WOMEN, LAW, AND PUBLIC OPINION, 74 (2001)
- RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 90 (1999)

Journal/Article

⁵⁴ Banerjee & Uppaluri, *supra* note 13.

- Debadyuti Banerjee and Ujwala Uppaluri, *From Roe v. Wade to Fetal Pain Legislation: A Reflection of American Jurisprudence on the Indian Milieu of Liberalised Abortion Policies*, 2 NUJS L. Rev. 637 (2009)
- John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) and Ruth Bader Ginsburg, *Some Thoughts On Autonomy and Equality in Relation to Roe v Wade*, 63 N.C.L. REV. 375 (1985)
- K.D. Gaur, *Abortion and the Law in India*, XV Cochin University LR, 123-143, (1991)
- Lynn M Morgan, *The Potentiality Principle from Aristotle to Abortion*, 54 supp.7 The University of Chicago Press Journals (2013)
- Priyaranjan Kumar Shukla, *Woman's Right to Abortion at Legal Crossroads* 19 IND. BAR REV., 89, 95 (1992)
- Simi Rose George, *Reproductive Rights: A comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the US*, 18(1) SBR (2006)
- Susan Sherwin, *The Concept of a person in the context of abortion*, 3(1) J Med Humanit 21-34 (1981)
- Swati Bajaj & Vikram Seth, *Unborn Right to Life Vis-a-vis Women Right to Abortion: Legal Reflection*, 2 issue1 JLSR, 127 (2016)
- Upendra Baxi, *Abortion and the law in India*, 28-29 JILI (1986-87).

Internet Sources

- Kshitij Asthana, *Medical Termination of Pregnancy Act and the right of women over their own body*, BLOG.IPLEADERS (DEC. 11, 2017, 11:00 AM), https://blog.ipleaders.in/medical-termination-of-pregnancy/#_ftnref28
- Paige Passano, *Manushi: Legal but Not Available, The Paradox of Abortion in India*, INDIA TOGETHER (Nov. 4, 2017, 10:00 AM), <http://www.indiatogether.org/manushi/issue126/abortion.htm>

Cases

Indian Cases

- Dr. Nikhil Dattar & Ors. V. Union of India, (2008) 110 BOM. L.R. 3293
- Gobind v. State of Madhya Pradesh, AIR 1975 SC 1378
- Javed v. State of Haryana, AIR 2003 SC 3057

- Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295
- Nand Kishore Sharma v. Union of India AIR 2006 Raj.166
- Satya v. Siri Ram AIR 1983 P H 252

U.S. Cases

- Bouvia v. Superior Court, 225 Cal. Rptr. 297, (1986)
- Cruzan v. Missouri Health Department, 497 U.S. 261 (1990)
- Griswold v. Connecticut, 381 U.S. 479 (1965).
- Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 912 (1992).
- Rex v. Bourne, 3All ER 615 (1938)
- Roe v. Wade, 410 US 113 (1973)

Statutes

US Law

- Unborn Child Pain Awareness Act , 205
- Unborn Victims of Violence Act, 2006

Indian Law

- Medical Termination of Pregnancy Act, 1971
- Indian Penal Code, 1860
- The Indian Constitution, 1950

Reports

- Department of Reproductive Health and Research, WHO, *Unsafe Abortion: Global and Regional Estimates of the incidence of unsafe abortion and associated mortality in 2008*, WHO (2011)
- United Nations, Department of Economic and Social Affairs, Population Division. *Abortion Policies and Reproductive Health around the World* , UN publication, Sales No. E.14.XIII.11 (2014)
- US Supreme Court Reports, 35 The lawyers cooperative Publishing co., at 147 to 199