

FEMINISM, MORALITY AND ABORTION RIGHTS: A COMPARATIVE STUDY OF INDIA AND USA

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ABSTRACT

Women's movement have led to liberalization of rights of women. A women's body and her reproductive system is her own right. But this is a pretence when we talk of women's right in regards to abortion. Amongst the moral and legal debates of abortion, the legislature and activists forget the rights of a women and her decision of abortion. Her privacy is violated and denied. The subject of her right over her own body and the choice she makes is condemned and over shadowed by a false sense of justice.

In American Jurisprudence, had legalized abortion in the United States of America and secured the rights of women over their own body. But today there is a demand to over-rule this judgement by the anti-abortion law activists. It is sad to deduce that the courts that have supported the rights of women are now once again faced with the jurisprudential question of morality and law in regards to abortion laws.

The research analyses the dimension of feminism in relation to comparative studies of the present statutes governing abortion laws in USA and India.

Keywords – Abortion Rights, Feminism, Comparative Studies, Morality, Women's Autonomy

INTRODUCTION

A women's right to choose in respect to her reproductive organs have always been a political and legal question. In the last few decades, we have observed that abortion right have been a subject of public scrutiny. Many theologians, scholars and feminist either support it or condemn it on moral, ethical and reasonable grounds.

In an egalitarian society, Ruth Colkerⁱ points out that "this is not the debate of choosing a mother's life over the fetus life, rather it is a debate of one's own health over abortion". I agree with her. Getting an abortion is not an easy decision for many women. To the extent that some may experience lifelong traumaⁱⁱ. Hence it is very important to understand the will of women in order for them to freely exercise their right to autonomy and abortion.

In *Roe v. Wade*ⁱⁱⁱ, the American Supreme Court recognized and protected a woman's decision to terminate her pregnancy. Similarly, abortion rights have been granted to women in India and the courts have recognized their right to bodily integrity including right to self-determination. But women in both these countries are still unable to fully access these rights due to religious and other grounds presented by the patriarchal society.

FEMINIST PERSPECTIVE ON ABORTION

Women have always been defined in their gender roles as mothers due to their ability to give birth. Women are termed as care givers and homemakers just because they can bear children. In past, it has always been presumed that women would want children. It is their natural duty. But when women suggested against children and opted for abortion, it was morally contempt. Many theologians considered it to be a sin.

In Christianity, the popular opinion condemns abortion and have termed it as a "sin". They believed that it goes against the fundamental Christian norm of love, a norm which forbade the taking of life. That includes the life of the foetus. Another reason, catholic Christians frown on abortion and contraceptives as it forbade the separation of the unitive, i.e. love-fostering, aspect of sexuality from the procreative aspect. The Church declared that matrimony is essentially linked to procreation, it was recognized that 'the good of the offspring requires that the spouses truly love each others'^{iv}. Catholic Christians are against abortion without any exception. Although some text such as by Saint Thomas Aquinas and Spanish Jesuit Tomas Sanchez

believe in some exceptions including when the life of the mother is in danger. But the popular believes have denied these exceptions.

In Hinduism, Atharvaveda states: “Enter into the rays, into smoke, O sin; go into the vapours, and into the fog! Lose thyself on the foam of the river! 'Wipet off, O Pūshan, the misdeeds upon him that practiseth abortion!” Other various texts such as Āpastambadharmasūtra and Gautamadharmasāstra also condemn abortion. Although hindu’s consider abortion as a sin but not in all cases. In the chapter Chikitsasthana of Sushruta Saṃhitā, Sushruta considers that the doctor who assists at birth must act with respect and care both for mother and foetus, but the same text stipulates that “it is best to cause the miscarriage of the foetus, for no means must be neglected which can prevent the loss of the mother”. It is interesting to note that Hinduism differentiates between abortion and miscarriage on the basis of intention: “while abortion implies intention and consequently responsibility for killing an embryo or foetus, the miscarriage is unintended and morally neuter.”^v The text also suggest that women’s health and life is given paramountcy over the health and life of foetus. Hence, Hinduism gives some relaxation to women but it denies them the right to choose for themselves.

When we think of abortion in the light of morality there are contradictory opinions. Some authors accept abortion and some denies it. Some author accepts it in extenuating circumstances such as rape, eugenics and medical indications. This is important to understand as no law can exist in isolation and without morality. The natural school of law dictates that a law should be based on morality and reason. This research paper discusses various feminist perspective to determine the morality and reasons behind right to abortion.

Although, theology condemn abortion rights except when the life of the mother is in question but when we consider the same question in the light of modern values the majority opinion favors the right to abortion. JJ Thompson supports this claim via discussing various moral dilemmas faced by women when considering abortion and concludes that the right to life consists not in the right “not to be killed, but rather in the right not to be killed unjustly.”^{vi} Hence, Abortion rights may not be theologically acceptable but it can’t be considered immoral.

“As a feminist and a Catholic, I believe a woman's freedom to abort a fetus is a monstrous, a tyrannous, but a necessary freedom in a fallen world”^{vii}. “The majority of women who abort do so because they know that the unwelcome child, born of constraint or misfortune, will be wounded in some unacceptable way.”^{viii}

Women today are not confined to their homes or marriage. Women are independent in taking their decisions over their livelihood and bodies. They expect the same when determining reproductive rights. Hence, opting for abortion is a matter of autonomy and self-determination.

National Organization for Women (NOW) was the first organization to speak on the rights of women questioning abortion. “We said that it is the inalienable human right of every woman to control her own reproductive process . . . This question can only really be confronted in terms of the basic personhood and dignity of woman, which is violated if she does not have the right to control her own reproductive process”^{ix}

Andrea Dworkin sees abortion as “*Abortion is also ideologically central to understanding women's condition. What abortion means to women is the absolute right to control the reproductive functions of our own bodies. . . But abortion is the symbol of a woman's life*”^x

For pro-choice feminists, right to abortion is a positive direction in liberation of their self-determination and autonomy. They believe that right to abortion gives them control over their bodies. It is about strengthening their position in the society. “Pro-choice arguments are rooted in superiority feminism's elevation of the "private" morality of women over the "public" morality of men. In this spirit pro-choice define abortion as an intensely personal experience that no man can judge.”^{xi}

Feminist political theory is taken to entail merely the "discovery" of the "private", hitherto excluded from "public" scrutiny. Susan Moller Okin, for example, asserts that “while some feminists have argued that there is no need to maintain a private sphere, many, including myself, would agree with mainstream political theorists with the need to maintain a sphere of privacy.”^{xii}

But not all feminists support pro-choice arguments. Ruth Colker, a pro-choice feminist raises a concern over disrespect shown to the seriousness of the pro-life position.^{xiii} As every coin has two sides it is imperative to understand the pro-life feminist opinions.

The pro-life feminists discusses that the practice of abortion is violent, unethical and malicious. “*Pro-abortion feminists open themselves to charges of crass hypocrisy by indulging in the very same behavior for which they condemn men: the unethical use of power to usurp the rights of the less powerful*”^{xiv}

They further argue that the ideas of justice go beyond the autonomy or individuality of women and it is a social consciousness of feminist authenticity. They aim to transform the ideas of autonomy and self determination to that of responsibilities. They consider it to be a natural responsibility of women to give birth and care for a foetus. By opting for abortion, women are going against the natural course of law.

Pro-life feminism attempts to elaborate a more just social order, beginning with the sociological insight that men and women become pregnant^{xv}, and that no abortion is ever a private matter. While it is true that some feminists, are certainly aware of the societal dimensions of the abortion decision, their devotion to the body right argument prevents them from seeing the deep truth undergirding the sociological insight. Pro-life feminism labors under no such misconception. A woman does not conceive a child alone and male irresponsibility must not be followed as the model here.^{xvi}

The biggest flaw observed in the pro-choice arguments is that abortion rights are not exclusive. They are inclusive of various other rights that women are entitled to. By depriving women from right to abortion we are also depriving them from right to health, life and physical and mental wellbeing. I have not divulged into the debates of abortion as a form of self-defense because an unborn child or foetus is not a “parasite” or “killer”. Nor I wish to indulge into debates whether abortion laws indulge or liberates women from patriarchal society because importance lies in the matter that women should be given a choice in determining their bodily integrity.

ABORTION LAWS IN USA

In United States of America, abortion rights has a long judicial and political history.

In *Roe v. Wade* abortion was allowed on the request of the woman in consultation with her doctor in the first three months of pregnancy and recognizes right of personal privacy is a fundamental right, only a “compelling State interest” could justify its limitation by a state. “the Court concluded, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”^{xvii} In *Doe v. Bolton*, the Court extended *Roe* by warning that “just as states may not prevent abortion by making its performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers.”^{xviii}

Planned Parenthood of Southeastern Pennsylvania v. Casey^{xix}, the court reaffirmed the judgement of Roe v. Wade on three grounds. “First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state. Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman’s life or health. Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.”^{xx}

The Court in City of Akron v. Akron Center for Reproductive Health, “noted advances in medical technology since Wade and ruled that because of these advances the health of pregnant women in at least part of the second trimester would be safe guarded as easily in an abortion clinic as in a hospital.”^{xxi}

“On December 20, 2019, President Trump signed into law H.R. 1158, the Consolidated Appropriations Act, 2020.”^{xxii} “Where funds provided to the Department of Justice could not be used to pay for an abortion, except when the life of the mother would have been endangered by a fetus carried to term, or in the case of rape or incest”^{xxiii}. “The omnibus measure prohibited the use of appropriated funds to pay for an abortion or for any administrative expenses related to a health that provided benefits or coverage for abortions.”^{xxiv}

The challenges faced by women in USA, is the aggression and violence of pro-life activists against women exercising their right to abortion. It has become a political issue rather than a judicial issue. Getting an abortion is not a very pleasant experience for women. Joshua C Wilson^{xxv} and Laura Oaks^{xxvi} explains the various scenarios where pro-life activists have imposed their ideologies on young women and its repercussions. The state there has failed to intervene and subsequently women are unable to practice their right freely.

In Dobbs v. Jackson Women’s Health Organization^{xxvii}, the United States Supreme Court held that the Constitutional rights do not extend to abortion.

ABORTION RIGHTS IN INDIA

In India, the situation is different yet it is the same. Abortion rights are governed by the MTP Act^{xxviii} 1971, wherein the medical practitioner determine whether abortion is justified or not.

It is the sole discretion of the Registered Medical Practitioner (RMP) to decide on health or humanitarian grounds. But just like the USA, in India too this position of law has a background IPC, 1860^{xxix} and CrPC, 1973^{xxx}, criminalize inducement of abortion except for the purpose of saving the of the woman. This provision increased the quantum of safe abortions in India. The Parliament felt the need for a legislation and enacted the MTP Act which regulated and considered abortions no longer illegal in instances where: -

- i) Reasons were established for performance
- ii) Abortion is performed in a specified time period
- iii) Abortion was required to be performed by RMP and under prescribed conditions

The most important provision of the Act is Section 3 which states that a pregnancy can be terminated.^{xxxi}

One of the most progressive points about this law was that it identified the suffering caused to a woman because of being raped constitutes a grave injury to the mental health of the pregnant woman. But the MTP Act had faced various criticism from various feminist as it disregarded the autonomy of women. First, The Act imposed a limit of twelve weeks within which a woman needs to decide to terminate her pregnancy which was not convenient for many women. Second the act distinguished between married and unmarried women where in case of contraceptive failure a married women is allowed abortion but an unmarried woman is allowed abortion only if it poses a severe risk to her well being or there exists a fetal abnormality. Third, the act required the consent of husband which is in contrast to the autonomy of women.

In *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*^{xxxii}, the court held that

“22. It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel her wife to give birth to a child for the husband.”

In *Suchitra Srivastava v. Chandigarh Administration*^{xxxiii}, the “courts affirmed women's right to choose in the context of continuing her pregnancy. They read this as a fundamental right to privacy and bodily integrity as enshrined in the Constitution under Article 21.”

The MTP Act was amended in 2021^{xxxiv} and its key features are

1. The **termination of pregnancy may be done up to 20 weeks** in the case of failure of contraceptive method or device regardless of marital status.

2. For the termination of pregnancy up to 20 weeks of gestation only one opinion of Registered Medical Practitioner (RMP) and opinion of two RMPs for termination of pregnancy of 20-24 weeks of gestation is required.
3. The “name and other particulars of a woman whose pregnancy has been terminated shall not be revealed”, except to a person authorised in any law that is currently in force.
4. The upper gestation limit has been increased from 20 to 24 weeks for special categories of women i.e. survivors of rape, victims of incest and differently abled women, minors, among others.

The amendment is a step in right direction but it is full of lacunas as the government has failed to address various concerns faced by women. Moreover, the act do not acknowledge the autonomy of women. They do not provide an easy access to abortion in government hospitals. No relaxation for women belonging to Economically Backward Class (EBC), who can't afford abortion.

Free practice of abortion rights has been acknowledged by American and Indian judiciary but same have not been granted by the legislature. In both the countries that legislature and the executive have failed to accept and recognize the self-determining right of abortion rights. Women have the right to self-determination but they can't practice the same in the current socio and economic scenario due to lack of government intervention.

CONCLUSION AND SUGGESTIONS

Dorothy McBride^{xxxv} highlights the lack of participation of women in development of reproductive rights. She enumerates that woman are not given due regards in development of abortion laws. Afterall, it is the women who are at the receiving end and the legislature have continued to fail to incorporate their needs and requirements in the current law. The lack of participation of women also indicates upon the control and dominance of the patriarchal society which they can hardly relate to. Men do not get abortion nor they undergo its repercussion yet they highly feel entitled to make laws on it. Here, I am not denying the right of a father over the unborn child rather I aim to question their right over the body of a mother. In a bigger

picture, I question, what right does patriarchy has to decide over the bodily integrity of a women.

It is only when women are part of the discussion and deciding panel, we can understand and improve upon the various issues faced by women. It gives rise to meaningful debates which increases the scope of a fair and just law. For instance, in the above discussion some feminists think of abortion rights to be private law and other consider it as public law in nature. If the right is private, then to what extent? Also, the mother will be depriving the society from a “person” who will be its member.

Women today needs to be educated upon their reproductive rights including abortion rights. This is important so that they could make a conscious and informed decisions. Moreover, I suggest state sponsored counselling sessions for pregnant women. In fact, in a study it was claimed that only 24% woman were content with their decision of getting an abortion^{xxxvi}. It will ensure that women are able to exercise their right freely. Also, it will give an opportunity to her and if married, their partner, to grieve about the need to have an abortion.

Right to abortion is not a political debate, rather it is a concern of many women. It is a human right that is inaccessible due to technicalities and procedure. It is disappointing that women in India and USA, struggle to avail these rights. To the extent that some of the women are not even aware of this right. I propose that that government should take active participation in enhancement of awareness of women’s right and develop an campaigns to educate women on their reproductive rights. This will ensure an and strengthen women’s autonomy and their ability to make conscious decisions.

ENDNOTES

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ⁱⁱ Jeannie Suk, *The trajectory of trauma: bodies and minds of abortion discourse*, Columbia Law Review, 110(5), 1193–1252, (2010).

ⁱⁱⁱ Roe v Wade, 410 U.S.

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- xiii Ruth, *Supra* note at 1, 1046.
- xiv Faye Ginsburg, "The 'Word-Made' Flesh: The Disembodiment of Gender in the Abortion Debate," p. 72.
- xv Cf. Kristin Luker, *Taking Chances*, p. 136.
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- xxii Public Law. No. 116-93, 133 Stat. 2317, Act of Congress, 2019 (USA).
- xxiii Id. § 202, div. B, tit. II, 133 Stat. 2317, 2412.
- xxiv Id. § 613, div. C, tit. VI, 133 Stat. 2317, 2480
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- xxvii Dobbs v. Jackson Women's Health Organization, 2022 U.S. LEXIS 3057
- xxviii Medical Termination of Pregnancy Act, 1971, No 34, Acts of Parliament, 1971
- xxix Indian Penal Code, 1860, § 312, No 45, Acts of Parliament, 1860 (India).
- xxx Code of Criminal Procedure, 1973, No 2, Acts of Parliament, 1973(India).
- xxxi Medical Termination of Pregnancy Act, 1971, *Supra* note 27, § 3, provides grounds for termination of pregnancies by a RMP within 12-20 weeks in good faith, or risk of physical and mental injury to the mother, eugenics, minor or disabled person with her consent.
- xxxii Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, 2011 SCC OnLine P&H 16218
- xxxiii Suchitra Srivastava v. Chandigarh Administration , (2009) 9 SCC 1
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