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Abortion Laws in the United States and India: A Comparative Analysis

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ABSTRACT

It has been a long-drawn battle for women to get their reproductive rights being legally recognised across countries. Time and again, these have generated debates because of their moral, ethical and religious implications. Historically, women have been categorised as the weaker section of society and have been denied basic human rights, including the right to choose to abort. The legislative frameworks have remained insufficient for quite a long time in addressing these issues at the grassroots level.

Even in recent times, the overruling of the 50-year-long judgment of Roe v. Wade by the Supreme Court of one of the most developed countries led to hue and cry. On the other hand, in developing countries like India, laws are being enacted and subjected to amendments so as to grant and recognise these reproductive rights of women.

This paper aims to analyse the legal framework with respect to the recognition of reproductive rights of women and thereby draw a comparative analysis of US and India.

Keywords: *Reproduction, Abortion, Human Rights, Legislative Frameworks.*

I. INTRODUCTION

The voluntary termination of pregnancy is referred to as “Abortion”. The right to an abortion is one of the most fiercely debated topics in any society, not just in India, but around the globe. Most nations around the world still regard abortion as a delicate issue, and it receives a lot of attention internationally. Abortion was referred to as the “chief crime of the nineteenth century”, “a direct war against human society” and a drill of “undermining the very foundations of our civilization” in the United States.²

Practically in every nation, abortions are still entirely prohibited or subjected to strict legal restrictions. It is a societal problem that has split theologians, philosophers, lawmakers, and the general public as to whether and to what degree abortions should be authorised, promoted, regulated or prohibited.³ At present, in almost every nation abortions are allowed either for socio- economic reasons, or to protect the mother’s mental or physical health, or to stop a rape-

¹ Author is a LL.M. student in India.

² Garima Tripathi, Legacy and Legality of Abortions in India and USA, Amity Law School, Noida, file:///C:/Users/KIIT/Downloads/SSRN-id3636238.pdf.

³ Dr. Lily Srivastava, Law and Medicine, 114 Universal Law Publishing Co. (2013).

related pregnancy from continuing, or to prevent a birth with a major physical or psychological impairment, or hereditary abnormalities, or to control population.⁴

The Indian Constitution grants every person the right to life & liberty except in accordance to the procedures established by law.⁵ The Right of termination of pregnancy is one of the significant rights among the various rights that are granted to the women under various laws. It is noteworthy that “right to abortion” has been recognized as a part of “*Right to Privacy*” which stems from “*Right to life*”.⁶

According to Dworkin, prior to the third trimester, a foetus has no interest.⁷ Because of insufficient brain development earlier in pregnancy, the embryo cannot experience pain except in late pregnancy. The consensus among scientists is that the embryonic brain will be enough developed to experience ache starting from the 26th week.⁸ Therefore, whether abortion is in a foetus' best interest must rely on whether the foetus has interests of its own, rather than whether interests would arise if there is no abortion. Interests cannot exist in an inanimate object. Furthermore, not everything that has the potential to become a person also has interests. A foetus may develop interests once it can survive on its own, which is only possible after the third trimester.⁹ It has often been witnessed that the political, historical and sociological perspectives of a Nation often influences whether that nation permits an abortion within its legal system.

(A) Research methodology

In this paper the author aims to discuss the Indian legislative framework which regulates and protects the right of abortion. Secondly, the paper will also discuss the developments with respect to abortion in the United States and thereby draw a comparative analysis of both the country's legislative frameworks. This is a purely doctrinal research, wherein the researcher aims to discuss the various case laws and the recent developments in this field.

(B) Statement of purpose

The paper intends to research and provide a comprehensive understanding about the laws of abortion, in both India and US. The paper aims to make the readers aware about the legislative framework which has been undertaken with the changing needs in order to regulate abortions in both these nations and its effectiveness in the present times. It will let us find out the

⁴ *Id.*

⁵ Art. 21, The Indian Constitution, 1950.

⁶ Roe v. Wade, 410 US 113(1973).

⁷ Ronald Dworkin, *Freedom's Law: The moral reading of the American constitution*, 90 (Oxford University Press ed., 1999).

⁸ Clifford Grobstein, *Science and the Unborn: Choosing Human Futures* (1988) at 13.

⁹ *Id* at 6.

drawbacks and loopholes in those frameworks.

(C) Research questions

The primary questions that the author aims to address in this paper are the following:

1. What are the legislative provisions which regulate abortions in India and USA?
2. Whether any recent developments have been made in these laws?
3. Comprehensive analysis of the Rights of Women in both US and India.

(D) Scope and limitations

In this paper, the author has limited the research to the analysis of India and US with respect to the laws and policies governing abortions in both these countries. A comparative analysis will also be made to assess the differences and the recent changes so as to understand how far these have been successful in protecting the interests of the society.

(E) Literature review

The paper authored by *Garima Tripathi*, titled “*Legacy and Legality of Abortions In India and USA*” elaborates on the laws pertaining to the termination of pregnancy in both India and USA. It discusses the various laws which governs the abortion rights in India and also suggests certain significant changes in the same. While discussing the terminations in USA, the author took into account the landmark case laws which existed for almost half a century. However, this paper does not takes into account the recent changes in the positions of law and policies pertaining to the same, since it was authored prior to the recent changes which have been addressed in the present paper.

In the paper titled “*Comparative Analysis of Right to Abortion in India and the United States of America*” written by *Saysha Chadha & Sidhanth Mor* emphasised on the need to change laws with the changing times and the recognition of women’s rights in India. This paper also analysed the various data relating to selective sex abortions and concluded that there exists a gap in the law which often prohibits the women to abort the unwanted pregnancies. The authors took into account the position of USA and emphasised on the need to recognise the right to terminate pregnancies as in the USA as a constitutional right.

In “*Understanding of Right to Abortion under Indian Constitution*”, the author *Sai Abhipsa Gochhayat*, discussed about the legislations which governs abortions in India, making a comparative analysis with the landmark US case. The author also suggests the importance of liberal and dynamic laws in the modern world.

II. ABORTIONS IN INDIA: LEGISLATIVE FRAMEWORK

In this Chapter, the author attempts to discuss and elaborate the important legislations that were enacted with the changing needs in order to provide the Right of Abortion, under certain circumstances. Prior to 1971, this was highly debated as to whether an Act should be specifically enacted to address the needs of the society and to grant the right to abortion or not. However, in 1971 the Parliament enacted a legislation, titled “*The Medical Termination of Pregnancy Act, 1971*” (hereinafter referred to as the MTP) in order to permit the termination of pregnancies under certain conditions and within a specified time frame.

Hereunder, the author has briefly discussed the laws which governed the termination of pregnancies prior to the 1971 Act and the salient features of the Act itself:

(A) Provisions under the indian penal code, 1860

“Induced abortion” has been criminalised under the provisions of IPC, 1860, the nation's fundamental criminal code, which was created considering the religious, moral, social, and ethical basis of the Indian population.¹⁰ Although a bare reading of the sections does not expressly mention words such as “abortion”, “miscarriage” and “unborn child”, however the voluntary causing miscarriage is criminalised under the Code.

Section 312 of the IPC, 1860 categorically mentions that a woman shall be convicted for an offence under the said Section for two reasons. Firstly, when a woman is “*with child*” and when she is “*quick with child*”. However, this Section also permits the pregnancy to be terminated on medical grounds, especially when the life of the woman is at risk.¹¹

In the past few years, the laws relating to Abortion have been subjected to drastic changes wherein many countries have liberalised as well as restricted the laws with respect to the same. With respect to India, the abortion laws have been liberalised with the enactment of the MTP Act, 1971. The legislative intent behind the enactment of this Act was to provide the woman of the nation with certain exceptions to the strict provisions of the IPC, 1860 and to vest the right of Abortion.

(B) Provisions under the mtp act, 1971

The objective behind the enactment of the MTP Act was to regulate and permit the termination of certain pregnancies to be performed by an under the supervision of medical specialists. This Act mentions the periods within which the pregnancy can be terminated. In the recent past, India

¹⁰ Sections 312 & 314, The Indian Penal Code, 1860.

¹¹ *Id.*

has broadened the time duration for the terminations from 12 to 20 weeks (with the opinion of one medical practitioner) or 24 weeks (with the opinion at least 2 medical practitioners). The primary objective of termination is to save the life, mental or physical well-being of the mother. The Act also permits such termination if the child were to be born; there is a significant risk that it could have some major physical or mental abnormalities.¹²

It is noteworthy that with the 2021 Amendment of the MTP Act, 1971, a new provision in order to ensure the protection of women's privacy has been inserted.¹³ This Section binds the medical practitioner so as not to reveal the particulars of a woman, whose pregnancy has been terminated, along with her name, except to a legally authorised person.

An amendment in the legal threshold for abortion was necessary in the opinion of both, legal and medical experts. It was felt that the two-week window provided under the Act was insufficient for the prospective parents to make the tough decision of whether to retain their child because foetal abnormalities do not manifest until 18 weeks. The timeframe before amendment was too narrow even for the medical professional to consider every alternative before advising the patient to take the drastic measure.

III. ABORTIONS IN THE UNITED STATES: LEGISLATIVE FRAMEWORK

The laws relating to abortions have always remained a subject matter of controversy and highly debatable. Different social and political factors often influence the framing of the abortion laws. In the USA, during the 1960s there was no centralised regulation that fully controlled matters relating to abortions, and other states had outrightly banned this procedure with the exception of situations where the survival of the woman was at risk.¹⁴ The female-led organizations sought the opinion of the US Supreme Court, since there was a lack of any one definitive decision and confusions among the people kept on growing.

Finally, the US Supreme Court recognized this right of abortion long back in the year 1973¹⁵, which was in force and followed in the United States until the recent overruling of this constitutional right in 2022.¹⁶

(A) *Roe Vs. Wade*: Recognizing The Right To Abortion

The US Supreme Court in *Roe v. Wade*¹⁷ held the right to an abortion to be within the purview

¹² §3(2), The Medical Termination of Pregnancy Act, 1971.

¹³ *Id.*, at §5A.

¹⁴ Garima Tripathi, Legacy and Legality of Abortions in India and USA, Amity Law School, Noida, file:///C:/Users/KIIT/Downloads/SSRN-id3636238.pdf.

¹⁵ *Roe v. Wade*, 410 U.S. 113.

¹⁶ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).

¹⁷ *Id.*

of privacy rights which was recognized under the US Constitution. The constitutionality of the Texas Criminal abortion laws was challenged in this case. The Court considered the right to abortion to stem from a number of Constitutional Amendments and thereby a part of the Constitution.¹⁸ It is noteworthy that even though the Court recognized the right of abortion to be a fundamental right under the Right to Privacy, however this right was not absolute, rather it was to be weighed against the interests of Government in preserving foetal and maternal health. It provided this right of abortion till foetal viability i.e. until the third trimester.

Subsequently, in *Planned Parenthood Southern Pennsylvania v. Casey*¹⁹ new variables to abortion rights were provided, wherein the Court held “right to abortion” to be a part of “liberty” protected by the Fourteenth Amendment’s Due Process Clause. The Court in this case reiterated the right of a pregnant woman to choose abortion. However, instead of regulating abortion based on trimester, it established a “foetal viability” threshold.

(B) Dobbs Vs. Jackson: Overruling Roe And Casey

In the present case, the Mississippi State Legislature Act was challenged where under abortions post 15 weeks was prohibited which was much before the time at which the foetus becomes viable, that is, around 24 weeks.

In this case, the US Supreme Court on June 24, 2022 by a majority of 6:3 overruled both, *Roe* and *Casey*, and held that the US Constitution does not recognize the right of termination of pregnancy as a fundamental right. The Court was of the opinion that the 14th Amendment’s due process clause, which is presently relied upon by the proponents of *Roe* and *Casey*, does not implicitly safeguard the “right to an abortion” or make any mention in the US Constitution.²⁰ The ambit and scope of the Due Process Clause was mentioned in this Case so as to guarantee rights which are embedded in the history and tradition of the nation and can be implied from the notion of liberty.²¹

Thereby, in this case the Court granted the power and responsibility to decide upon abortion laws to the elected representatives of the people.

IV. COMPARING ABORTION LAWS: INDIA AND THE UNITED STATES

The previous Chapters provide an idea with respect to the laws in both these countries. In India, the laws are subjected to change with the changing needs and times and thereby MTP Act, 1971

¹⁸ *Id* at 15.

¹⁹ (1992)120 L.Ed 2d 67.

²⁰ *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. (2022).

²¹ *Id.*

was enacted. The Indian Parliament enacted this law so as to provide some exceptions and relief to a woman and to recognize and legalise the act of abortion by medical practitioners on certain grounds.

It was long debated whether the permissible period under this Act should be extended so as to clearly determine the foetal viability before the prospective parents or medical practitioners come to a decision. Eventually, in the year 2021, an amendment made with respect to the same, and the permissible limit of abortions was extended to 20-24 weeks.

Prior to the MTP Act, 1971, abortions were criminalised under the provisions of IPC, 1860 which was described as “intentionally causing miscarriage”. The only exception provided was “to save the female” under this Section.²² However, with the enactment of the MTP Act, 1971 woman’s right to abortion was recognized and safeguarded. It is noteworthy that this right is not absolute in nature and is subjected to the fulfilment of certain conditions.²³

On the other hand, the USA’s position with respect to the right of abortion and abortion laws has remained uncertain in the recent years. During the 1970s, in the case of *Roe v. Wade*²⁴, the US Constitution had recognized the “right of abortion” to be a fundamental right within the purview of “right to privacy” and thus “right to life and liberty” within the US Constitution.

The same position was upheld and reaffirmed by the US Supreme Court in a 1992 case²⁵ as to the Right to Abortion, thereby recognizing the right of woman to choose the point of viability.²⁶

However, in the year 2022, the US Supreme Court in a case²⁷ overruled the 50 years old position and held that “right of abortion” is not within the purview of the US Constitution or the Due Process Clause, and entrusted the power on the States to decide upon the laws and restrictions on abortions. This decision restricted the Woman’s right to abortion.

It has been highly condemned by the countries all over the world and it led to hue and cry within the nation. Even the present President of the USA condemned this judgment of the US Supreme Court and was of the opinion that in this modern world, with the overruling and abolishment of this Constitutional right of termination of pregnancy, the life of woman is at risk.

Thereby, it can be concluded that USA has withdrew itself from recognizing right to abortion as a facet of Privacy rights within the ambit of the US Constitution, and gave primary

²² § 312, The Indian Penal Code, 1860.

²³ § 3, The Medical Termination of Pregnancy Act, 1971.

²⁴ 410 US 113.

²⁵ *Planned Parenthood Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²⁶ Nikhil Rohtagi, *Women’s Right to Abortion: Unpacking Dobbs v. Jackson Women’s Health Organization and the law in India*, <https://www.barandbench.com/columns/womens-right-to-abortion>.

²⁷ *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. (2022).

importance to the life of the unborn child. The right of woman to choose abortion has been vested with the State to decide upon, rather than on the individual.

On the other hand, with the changing requirements, India has always amended its position on the issue of abortion. While doing so, India has widened woman's power to seek for an abortion over the years. Till 1971, India had criminalised abortions with a single exception of saving the mother's life. However, after the enactment of the MTP Act, 1971 India has legalised abortions based on certain conditions, which has ultimately vested the woman with the right to seek abortion, rather than coercing the woman to give birth to a child under certain unforeseeable circumstances.

V. CONCLUSION

In light of the abovementioned discussions and elaborations, it is evident that the Statutes do not specifically mention anything about the moment as to when an embryo comes to life. In this paper, the Constitutional provisions of both India and USA has been analysed and it can be concluded that the interests of a woman is of paramount importance as compared to that of a foetus, with respect to the right of abortion, since the foetus is still an unborn person.

The recent developments of US on the abortion laws, which overturned its 50 year old ruling and denying woman the constitutional right to terminate pregnancy has been led to large scale protests across the nation. President Joe Biden opined this decision to be a "tragic blunder".

On the other hand, India has legalised abortions since the past 50 years under certain conditions. The enactment of the MTP Act, 1971 reflected the dynamic nature of law, which paved way for the recognition of woman's right to abortion.

Thereby, at present there is a drastic contrast in the positions and laws of both these countries. In the opinion of the researcher, woman's right to abortion should be recognized, not absolutely, but with certain reasonable restrictions, so as to protect the mental and physical health of the woman of a nation.

The recent developments in the US has definitely deprived woman their basic rights, as with the abolishment of these Constitutional recognitions & empowerment of the States to frame laws on these sensible matters the lives of the birth givers are at risk. In this modern world, many a times people choose not to give birth to a child due to a number of factors such as socio-economic factors, population etc. and the absence of these rights in such scenarios can pose great threat to the fundamental rights of individuals.
