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Abortion Rights - A Comparative Study India, USA & South Africa

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ABSTRACT

The practice of abortion is been prevalent in for so long in our society and now has taken different forms in political, social and cultural context. As per one class of society abortion is a woman's human right i.e. a controversial right in third world countries like India and South Africa. Restrictions imposed on said human right is in name of 'mother's right to health', in context of few countries, while others restricts it in name of 'embryo's right to life', increase in female foeticide and moral and social restrictions.

Often, Legislature and judiciary has struggled to strike a balance between the rights of pregnant women and the rights of fetuses. abortion laws and practices in different nation, often leads to complex cases and policies governing when and under what circumstances a woman may legally have an abortion rights and thus, judicial intervention plays crucial role. When abortion is safe, simple and undeniable available on the woman's will in affordable and accessible manner. Considering this perspective, few existing laws justify purpose. However, the laws of India and different nation making efforts to balance rights of women of abortion and rights of foetus. As in India Abortion and Reproductive Autonomy of women is in conflict with personhood of foetus. Though Indian judiciary is making efforts to make women to have abortion more liberals and is trying to make harmony of laws to facts of exceptional case. The aim of paper is to provide a wide view of laws and policies on abortion and right of foetus around the nation of India, USA, South Africa. Comparative Analysis of laws and extent of right recognised and accepted freely by India, USA, South Africa. Judicial and legislative proposed possible recommended changes which try to settles conflict of rights.

I. INTRODUCTION

Women living in every nation, irrespective of its developed or underdeveloped, are vulnerable to the complication of unintended pregnancy. Abortion as controversial right have been discussed in both national and international forums of different nation.

Tough according to different religions abortion is condemned but there are other various

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aspects with strong questions of morality, infanticide, coupled with ethics and right of women. But in spite of that always the concerned question arises of rights whether the mother possess the right to abortion or the child has a right to life. Even in countries like India, USA or south Africa where it is legal from a long period, abortion continues to sparkle many questions concerned of ethical, philosophical, and scientific nature and the legitimacy of resorting to it is still seen as problematic, debatable and questionable.

The Illegality of termination of pregnancy has a direct impact on the right of gender equality under constitutional right of equality. Tough the same time, a controversial debate between the overlapping spheres of law and morality exist. Not to mention, it depicts need of balance between the two sets of conflicting interest rights of potential life and mother. It is apparent that there are two sects with two different ideologies of pro-life who supports the right to life of the foetus and the pro-choice who supports the autonomy and privacy of the woman. The issue of legitimization in this manner unavoidably hauls the assessment and consequent apportioning of the dissimilar rights and represents a battle between "right to prematurely end versus right to birth" under right to life. The issue of legalisation in this manner unavoidably hauls the assessment and consequent apportioning of the dissimilar rights and represents a battle between "right to abort versus right to birth" under right to life.

The right to life is the most fundamental and broader concept. In India, right to life has been guaranteed under part III, fundamental right of the Constitution under article 21 which says that "No person shall be deprived of his life and personal liberty except according to procedure established by law. Among different various recognised and available rights to a woman, the right to abortion is also one of the basic fundamental inseparables and essential and right under right to privacy.²which is a part of right to personal liberty and emerges from right to life. But the controversial and debatable question of right always arises whether an unborn child should be considered as a human being and be assigned the status of a person or not.

The United States law related to abortion has remained both controversial and debatable and varies from State to States. In United States, prior to landmark case of *Roe v. Wade*³, there was a general statutory prohibition on abortion in almost all States and was permissible and legal only under very limited circumstances such as rape or incest. It was in this case, the US Supreme Court ruling of including the right of a woman to have children with consultation with her doctor without any interference from State as part of right to privacy with exclusive

² Justice k s Puttasamay and anr. V. UOI and Ors. (2010) 10 SCC 1

³ 410 U.S. 113 (1973)

freedom in the first trimester of pregnancy to abortion with consultation with her doctor however during the second trimester the State can regulate abortion in order to protect women's health. The United States law on abortion even today is more or less divisive as the debate on reproductive right is still unsettled and is of both political and legal nature.

US Supreme Court recognized the right to abortion a fundamental liberty under right to privacy guaranteed and protected by the Fourteenth Amendment of the US Constitution. Since *Roe v. Wade*⁴ the SC has secured the Constitution's protection for essential right of liberty to each individual's right to make personal decisions about family and childbearing.

South African Constitution also explicitly includes rights to reproductive health, freedom and autonomy⁵ (reproductive decision-making and bodily integrity) alongside equality, dignity and privacy in its text. These provisions provide a basis for conceptualising reproductive rights as integrated and mutually reinforcing, linking a substantive idea of reproductive autonomy and self-determination to equality and health rights.

II. CURRENT SITUATION

Enacting laws on second-trimester abortions possess particular difficulties. Laws on second-trimester abortions is either loosely framed or neglected with proscriptive effects. Second-trimester abortions (14 to 23 weeks) around the world constitute an approximately 10% to 15% of abortions out of which India & South Africa constitute 25% because of poor availability to services of abortions. Unsafe abortions accounts for a large proportion of hospital admissions for treatment of complications and disproportionate number of deaths⁶. The law should protect second-trimester abortions. With social unacceptance of these abortions are very high, and laws are restrictive in nature with increasing as pregnancy progresses, even laws of first trimester. regardless of the realities, conviction that second-trimester abortion can be enacted still proceed. abortion with restrictive laws is being most violated on daily basis by women and abortion clinics. Results of research shows that countries with less restrictive laws, efforts are made to resolve needs of women. Yet such need of restriction free abortion needs to available to women efforts to meet women's need for abortion without restrictions need to be fulfilled.

India

According to HMIS reports⁷, In India 2016-2017 the rate of abortion of all total figures of

⁴ Supera Note 4

⁵ Art. 27 Constitution of the Republic of South Africa Act 108 of 1996

⁶ Marge Berer, "Abortion Law and Policy Around the World" *Health Hum Rights*. 2017 Jun; 13–27

⁷ National Health Mission report, 2 July 2018

induced abortions taken place took place was 970436 while 10 women died due to unsafe abortions every day.

As per reports of The Lancet Global Health medical journal- total of 1.56 crore abortions takes place in India in year India in 2015 while the data of 7 lakh figure as per central government of India.⁸ Which states that

According to International Institute of Population Sciences, the data of government only accounts for surgical abortion in state owned hospitals, no data of private hospitals available with government.

Total of 1.27 crore out of 81% abortions were medication, out of 0.2 crore 14% were surgical, and out of 8 lakhs only 5% were accounts for using other methods including unsafe methods.⁹

The major causes of deaths of women accounts from unsafe abortions are-

- High cost of termination of pregnancy.
- Lack of medical facilities in major area of rural,
- Lack of confidentiality
- Social stigma especially in case of unmarried women.

Despite the laws governing abortion through Medical Termination of Pregnancy Act (MTP Act), non-availability of properly trained providers without preparing detailed documentation with poor knowledge about the legality of abortions in India contributes to most of the major factors of deaths of women.

USA

States in USA imposes abortion restrictions of waiting periods to delay women led to closing of abortion clinics. Imposition of Limit to abortion service providers (clinic) acting as a de facto ban.

US supreme court order of closing half of all existing state abortion clinics operating. Law passed by state's Legislature in 2013 in Texas had reduced from 41 clinics to 20. Implementation of completely upheld then only 9-10 clinics will remain active operation¹⁰.

The figure of 5.4 million of women of reproductive age is More than 5.4 million in Texas.

⁸ The Lancet Global Health medical journal, "The incidence of abortion and unintended pregnancy in India, 2015" p- e111-e120

⁹ ibid

¹⁰ The Guardian "Abortion laws around the world: from bans to easy access" 5 Jan 2016

researchers claim that estimated claims that approx. 2 million women in US lives more than 50 miles from the nearest approachable clinic of abortion. In case of only few abortion providers were left out. But even in possible case that with 20 abortion clinics made almost impractical and inaccessible for women to have an abortion. In some area women have to wait upto period of twenty days to have consulted by a medical practitioner which makes the procedure more of high costly and non-affordable.

According to reports of abortion providers and pro-choice non-profit-making organisations that there is ambiguity of law in women about legality of abortion in Texas. And even there is emerging evidences that the law is dangerous. survey in taxes shows dangerous, alarming and surprise data that 100,000 to 240,000 number of women in Texas have adopted method of abortion with pills or any sharp object at home.

Abortion laws in US, vary from state to state, the study conducted by “Centers for Disease Control and Prevention “reported out of 1000 birth 210 abortions.¹¹

In 2015, 638,169 case reported from 49 reporting areas of induced legal abortions to CDC. The abortion rate of 11.8 out of 1000, (age 15 to 44 years) with the abortion ratio of 188 out of 1000 births. while Compared with 2014 data, there 2% decline in rate and ratio of the total number, rate. Additional data of 2006 to 2015, the reported abortions declined at rate, number and ratio by 24 percent, 26 percent and 19 percent. In 2015, recoded lowest for the entire time frame of analysis (2006—2015).

The most of cases reported of abortions in 2015 were in age of their twenties. The major cases of abortions(2015) were early period of pregnancy: 91.1% of abortions were at before 13 weeks period ; and abortions of 7.6% were at 14 to 20 weeks’ pregnancy period , and only 1.3% were performed at more than 20 weeks’ gestation while 24.6% of all abortions were early medical abortions which non-surgical abortion at less than 8 weeks’ gestation periods. The increase of 114% from 2006 to 2015 of abortions reported as early medical abortions, with an 8% increase from 2014 to 2015.¹²

South Africa

In South Africa Abortion is governed by the Choice on Termination of Pregnancy Act, 1996. Out of estimated abortions 52% -58% of abortions that take place in South Africa every year are illegal. According to the report published by Amnesty International in 2017 showed that less than only 7% of the country’s 3880 public health facilities perform termination of

¹¹ ibid

¹² Abortion Surveillance United States, MMWR Surveill Summ 2018

pregnancy. This is far less than the 505 medical facilities designated by the Department of Health to perform terminations of pregnancy across South Africa.¹³

III. KEY ISSUES

The Demographic and Health Survey (DHS) 1998, which formed the baseline indicator for the Millennium Development Goal (MDG) maternal mortality in South Africa, approximated the maternal mortality rate at 150 per 100,000 live births, 9 though many maternal deaths are not registered. The 2015 MDG target was set at 38 per 100,000 live births. However, in 2015, the World Bank estimated South Africa's maternal mortality rate decreased to marginally, 138 deaths per 100,000 live births.¹⁴

- South Africa has one of the most progressive abortion laws across in the world with high demand of abortion. However, it estimated that 50% of abortions in South Africa occur outside of authorised health facilities.
- Most of women who choose for illegal abortion services experience complications and sought care in the formal health sector, added strain to an already resource-constrained health system of nation.
- Objection by health care provider to providing abortion procedures results in fewer than half of government designated facilities providing abortion services.
- restricted access to second trimester terminations in public health facilities causes exceeding the legal gestation time period for obtaining such abortions and opting abortions outside of designated health facilities.
- The majority of women are unaware abortion rights under existing South African law thus, left only with option of going for illegal and unsafe abortion providers are their only option.
- Stigma of Religious and cultural associated with abortion also results in women seeking discrete, covert abortions outside of designated health facilities.
- Attitude of Legal authorities towards preventative measures to control street and cyber marketing for illegal abortion services providers in South Africa.

¹³ South African government news agency "SA's illegal abortion rate alarmingly high" Tuesday, July 10, 2018

¹⁴ World Bank Data: Maternal mortality ratio (2015)

- Abortion laws of respective nature in southern and east Africa persuade women in legal means with availability to affordable class. However, many of the cross-border clients opts unwittingly access abortions from illegal and unsafe abortion providers.¹⁵

IV. INTERNATIONAL PERSPECTIVE

Capability Women's to control their reproductive destiny and freely choice to terminate unwanted and pregnancies is a basic standard of substantive freedom and equality in society. In the 1990s, this began to recognition of international community in human rights as reproductive rights. Then in 1994, the International Conference on Population Development in Cairo (ICPD) recognised human rights, autonomy and gender equality at the view of women's sexual and reproductive health¹⁶, and the 1995 Fourth World Conference on Women in Beijing (Beijing) too reaffirmed these rights: 'The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.'¹⁷ 'Reproductive rights recognised in national and international constitute a bundle of human rights, that are interpreted in a way to support and enhance women's reproductive freedom, equality and health.

Abortion law varies from State to State and there is no common unified international law regarding especially for migrant women or asylum seekers. Internationally the concept of reproductive rights appeared for the first time in the 1968 Proclamation of Teheran¹⁸, which states¹⁹ - Parents have a basic human right to determine freely and responsibly the number and the spacing of their children while The Statute of the International Criminal Court specifically excludes any interpretation that could provide a basis for asserting an international right to abortion. In the definition of crimes against humanity, one finds that "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy" (Article 7(2)(f)). Articles 8(2)(b) (xxii) and 8(2)(e)(vi)²⁰, regarding war crimes, incorporate this definition by reference. The second

¹⁵ HEARD "Unsafe abortion in South Africa: country factsheet, Durban" Health Economics and HIV/AIDS Research Division/ University of KwaZuluNata (2016)

¹⁶ UN, 'Report of the International Conference on Population Development: Cairo Programme of Action' (1994) A/Conf.171/13

¹⁷ UN, 'Report of the Fourth World Conference on Women: Beijing Platform for Action' (1995) A/Conf.177/20

¹⁸ International Conference on Human Rights, 1968

¹⁹ Article 16 of the International Conference on Human Rights, 1968

²⁰ The Statute of the International Criminal Court (1998)

sentence does not, of course, establish by itself an international right to life for the unborn, but it has a protective effect insofar as it upholds national legislation that safeguards human life before birth.

The concept of reproductive right is further strengthened by the United Nations Declaration²¹ which states - “The family as a basic unit of society and the natural environment for the growth and well-being its members, children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children”.²²

International Conference on Population and Development (ICPD) 1994 -The Programme of Action broadly defined reproductive health to include all issues concerned to the well-being of the reproductive system and its functions and processes.²³

Articles 1 and 6²⁴ of convention do not explicitly recognise right to life for the unborn child and a obligation of state to protect such right, the articles read with the Preamble provides strong ground for a consideration that the unborn child is entitled to legal protection under the Convention. There are no express words in the Convention of a right to abort. Tough, there a distinct preference given for life for the unborn as along with born.

An unsuccessful attempt to by the Summit Outcome Document approved at the meeting of Heads of State and Government at the United Nations in September 2005 to “re-imagine” or “re-conceptualize” family planning to include abortion in the discourse of wars of international thematic conferences. The Summit accepted that “ensuring access to sexual and reproductive health services” is “essential” for meeting the Millennium Development Goals, although this view of acceptance is not found in the Millennium Development Goals themselves (at the Millennium Summit in 2000).²⁵

V. CONSTITUTIONAL PERSPECTIVES

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

²¹ United Nation declaration on Social Progress and Development 1969

²² Article 4 of United Nation declaration on Social Progress and Development 1969

²³United Nations Report of the International Conference on Population and Development, Cairo, 5-13 September 1994)

²⁴ Convention on the Rights of the Child (CRC) 1989

²⁵ Patrick J. Flood, “Does International Law Protect the Unborn Child?” in *Life and Learning XVI: Proceedings of the Sixteenth University Faculty of Life Conference at Villanova*

to alone."

After the Supreme Court's decision in *Griswold v. Connecticut*²⁶, it is now well settled in American constitutional jurisprudence that the right to privacy is wider to protect procreative choices from any kind of unreasonable interference from the state. In later decisions of courts have invalidated essentials of parental consent, spousal consent etc., in abortion laws on the grounds of violation of the right to privacy.²⁷ Thus, in contemporary times, the recognition of the right to privacy or the right to reproductive choice is no longer a subject of controversy.

Article 21 of Constitution of India, which is the inserted from the Due Process Clause in the U.S., has the term "personal liberty" instead of "liberty." The framers of the Constitution of India intended to narrower the protection afforded by the provision to only certain kinds of liberties related to the life and person of an individual."²⁸ Nevertheless, the Supreme Court has interpreted the term "personal liberty" in a broader sense to include specific freedom have been granted under Article 19 of the Constitution.²⁹

The *Puttaswamy*³⁰ judgment recognised the constitutional right of every women to make her reproductive choices, as a part of personal liberty under Article 21 of the Constitution of India. The bench also resettled the position in *Suchita Srivastava v Chandigarh Administration*³¹, which held that reproductive rights include woman's entitlement to carry a pregnancy to its own full-fledged period, to give birth and to raise children; as a rights form part of a woman's right to privacy, dignity, and bodily integrity under article 21.

By the end of mid 90's, the recognition of the right to privacy as a fundamental right was no longer controversial. Rather, the focus was shifted on identifying the limits of the said right. Following the compelling State interest test laid down in *Gobind*, the Court in *R. Rajagopal v. State of T. N*³², enumerated the limited exceptions to the right to privacy. The principle evolved by the SC was that the right to privacy is losses only if public interest is involved or if the information is already within the public domain, say, in the form of public records. Recently, the focus has been not on the conflict between State interests and privacy but on the conflict between the right to privacy with other individual rights.³³ Despite the right to privacy having been read into Article.

²⁶ *Griswold*, supra note 29

²⁷ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S.

²⁸ 7 Lok Sab ha Secretariat, Constitutional Assembly Debates 849 (rev. ed. 1999)

²⁹ *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597

³⁰ *Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1

³¹ (2009) 9 SCC 1

³² A.I.R.1995 S.C. 264

³³ *Tokugha Yeptomhi v. Apollo Hospital Enterprises*, A.I.R. 1999

Inspired by development in international recognition, the 1996 South African Constitution explicitly includes rights to reproductive health, freedom and autonomy which includes reproductive decision-making and bodily integrity alongside equality, dignity and privacy as part of its constitution. These provisions coupled with international recognition provides a basis for recognition of reproductive rights in integrated and mutual manner reinforcing, forming linkage for substantive idea of reproductive autonomy and self-determination towards equality and health rights.³⁴ Asserting individual reproductive autonomy affirms women's personhood, moral agency, bodily integrity and self-determination, and is foundational to their ability to participate equally in society.

South Africa is also limited its reproductive rights through defining reproductive autonomy in narrower sense or favouring over to programmatic healthcare. The 1996 Constitution of South African³⁵ is considered as a strong basis on gender equality, women's rights, including rights such as any unfair discrimination against, based on sex, gender and sexual orientation and rights to dignity, privacy, life and freedom and security of the individual. The section 12(2) states that 'everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction (b) to security in and control over their body'. Section 27 of the Constitution further guarantees the right of access to healthcare services, including reproductive healthcare. Both this provision enacted considering global framework of reproductive rights established in the ICPD.³⁶

VI. INTENSION OF LEGISLATURE

Abortion laws in India

Voluntarily causing miscarriage to a woman with child other than in good faith for the purpose of saving her life is a crime under section 312 of the Indian Penal Code (IPC) punishable by simple rigorous imprisonment and/or fine. Induced abortion was legalized in India in 1971 to curb maternal mortality and morbidity stemming from illegal abortions. Medical Termination of Pregnancy Act 1971 was hailed as a progressive act when it was passed, which was expected to decrease existing high mortality and morbidity of women by reducing illegal abortions. The term "Medical Termination of Pregnancy" (MTP) was used to reduce opposition from socio-religious groups. Unlike many developed countries which permitted abortion if there was fetal.

Further, the Act does not leave the decision satisfaction of the medical practitioner(s) are

³⁴ Rosalind Pollack Petchesky, *Abortion and Women's Choice* (Northeastern University 1990) 6-7

³⁵ The Constitution of the Republic of South Africa Act 200 of 1993

³⁶ Sections 9, 10, 11 and 14 of the International Conference on Population Development in Cairo (ICPD) 1994

satisfied, is a pre-requisite under the that the Act was not envisaged as a tool for choices. Instead, the Act grants the veto practitioner. Thus, abortion laws in India abortion a tool for controlling population woman's right to control.

Pre-Natal Diagnostic Techniques Act

Another enactment that throws up issues of reproductive rights is the Pre- Natal Diagnostic Techniques Act, 1994 ("P.N.D.T. Act"). This Act prohibits sex determination techniques in view of societal concerns over female foeticide.³⁷ While the legislative intent is laudable, the strategy devised for the achievement of the goal may be subject to criticism.

First, the legislature seems to have missed the point that demand fuels technology and not vice versa. Clamping down on a particular type of technology is not a solution because the market can evolve other ways of catering to the demand. For instance, after the passage of the P.N.D.T. Act, pre-implantation pre-conception sex selection techniques, Act, were developed. This necessitated bring these newly developed techniques strategy is to clamp down on technology, technology, it seems that endless amendments

Second, the P.N.D.T. Act ignores the fact acceptance is never the answer to socio-socioeconomic problems lies within society also lies in changing societal attitudes. prohibiting sex determination is not an effective foeticide, as is evidenced by the failure of P.N.D.T Act.³⁸

Thirdly, the Act also fails to recognize between the sexes cannot be achieved merely girl child. The quality of life of an unwanted that of her male siblings.⁴³ In fact, this is mortality rates among girls in the 0-6 age.³⁹

Once again, the State has encroached upon choices in order to serve a social objective, society.

USA

U.S. state legislators enacted a considerable amount of anti-abortion legislation during the 1990s. For instance:

- In 1992, virtually no states had informed consent laws. By 2005, thirty-three League [NARAL] 1992, 2005). states had informed consent laws in effect (National Abortion Rights Action

³⁷ Siddhi Hirve "Policy and Practice, Seminar", December, 2003

³⁸ Rupsa Mallik "Negative Choice: Sex Determination and Sex Selective Abortion in India", The Telegraph, March 11, 2004

³⁹ Vibhuti Patel "A Cultural Deficit, India Together" , August 2003

- In 1992, no states had waiting periods. By 2005, twenty-two states required women to wait a specified period before obtaining an abortion (NARAL 1992, 2005).
- In 1992, only twenty states were enforcing parental involvement laws. By 2005, thirty-four states were enforcing these laws (NARAL 1992, 2005).

There are two major factors that led to this increase in anti-abortion legislation during the 1990s. The first was a change in jurisprudence. When *Roe v. Wade*⁴⁰ was handed down in 1973 the U.S. Supreme Court established a trimester framework that allowed for greater state regulation of abortion in later trimesters.

With the exception of public funding restrictions⁴ and parental involvement laws, courts declared most other types of anti-abortion legislation unconstitutional in the years following *Roe v. Wade*⁴¹ (Americans United for Life 2007). However, in 1989 the Supreme Court in *Webster v. Reproductive Health Services* found constitutionally permissible some additional State restriction on abortion.

In 1992, additional latitude to regulate abortion, Supreme Court abandoned the trimester framework established in *Roe v. Wade* in favour of a doctrine of "undue burden." This allowed states to regulate abortion as long as the regulations did not pose an "undue burden" to the woman seeking an abortion. As such, the Supreme Court found constitutional many of the policies contained in Pennsylvania's Abortion Control Act, including a waiting period and an informed consent law (Wetstein 1996). However, both decisions of SC gave state legislators more freedom to regulate abortion (Americans united for life 2007)

South Africa

Development of Constitution of the South Africa , south African Parliament enacted legislation the CTOPA(Choice on Termination of Pregnancy Act) in 1996 to provide abortion on request up to a period of twelve weeks of pregnancy and on specified grounds, in consultation with a medical practitioner, allowed upto between thirteen and twenty weeks.⁴² Including grounds such as social and economic , the enacted grounds were intended to be sufficiently in open-ended manner to allow effectively abortion on request, in private a consultation with medical professional. conferring rights to choose whether to terminate a pregnancy on choice, the Constitution and CTOPA of south Africa assures women's moral autonomy, bodily integrity and personhood. Merely being subjects of medical and legal

⁴⁰ Supera note 4

⁴¹ *ibid*

⁴² Section 2 of Choice on Termination of Pregnancy Act (CTOPA)1996

decisions by others⁴³, women are legally entitled to citizens with rights-bearers. Without discriminating women as immoral and criminal, South African law decriminalised abortion laws and enhanced substantive abortion rights, along with of the global standard, and at the optimistic view of a Constitution that envisaged an inclusive, open democracy based on non-racial and gender biased, based of equality, dignity, freedom and social justice.⁴⁴ Tough there are arguments that It such moments are capably and potentially transformative, pointing towards the possibilities of disruptive oppressive gender relations. However, maternal mortality and morbidity declined by expanding access in the first decade of the CTOPA.⁴⁵ The CTOPA has withstand attempts to strike down in the courts and to stronghold its provisions in Parliament, as the Constitution has provided validity to it.

VII. JUDICIAL VIEW

India

In India, according to provisions of MTP Act does not require any judicial authorization for such abortion, the Supreme Court and different high courts across the nation have been dealing trough case to case analysis based on special circumstances to approve or deny abortions beyond 20 weeks of pregnancy. There have been at least 25 such cases since 2015 to 2018.⁴⁶ These cases mainly involved of pregnant women which were diagnosed of fetal impairment or either pregnant adolescents who were victims of rape. The judgments comprise of mixed view of court even in cases where petitioners seeking terminations in seemingly in similar circumstances. Thus, leading to confusion about the law and the need for reform to solve such ambiguity.

courts in India have allowed MTP after 20 weeks gestation in multiple cases. In the instances of individual petitions, courts have repeatedly recognized the need to ensure that women and girls are not in condition of forced pregnancies that may jeopardize their physical or mental health. Furthermore, the Supreme Court has, at many instances, ordered compensation to petitioners after they have been denied an abortion, recognizing that the government's negligence and inactive attitude led to the such forced continuation of pregnancy and has caused "incalculable harm and irreversible injury giving rise to emotional trauma."⁴⁷

⁴³ The Abortion and Sterilisation Act 2 of 1975

⁴⁴ Preamble, Section 1 Constitution of South Africa, 1996.

⁴⁵ Rachel Jewkes and Helen Rees, 'Dramatic Decline in Abortion Mortality Due to the Choice in Termination of Pregnancy Act' (2005) 95 South African Medical Journal 250

⁴⁶ Center for reproductive rights "Reform to address women's and girl's need for abortion after 20 weeks India" ReproductiveRights.org 18 -19

⁴⁷ Ms. Z v. The State of Bihar and Others 2017 SCC OnLine SC 943

However, there have also been contradictory views on different judgment that leads to ambiguity as to when a woman is legally allowed under MTP beyond 20 weeks. Courts have not laid down clear grounds to determine when an MTP is legal permitted beyond 20 weeks, how to surpass the need for unnecessary judicial and medical board intervention of authorization, and how to resolve the essential issue of providers' unwillingness to permit legal abortions. Notwithstanding of fact that there have been multiple petitions filed to courts across nation of requesting comprehensive law and policy reform, including one that has been pending since 2008 in the Supreme Court.⁴⁸ These petitions comprise of requests to consider: introducing language of recognizing the link between fetal impairment and a women's physical and mental health status; extending the health exception to match the life exception, which does not have a limit; and establishing an appeals process for women who have been improperly denied abortions, among various other claims involving reform of the law.⁴⁹ The recent improvement in The MTP (Amendment) Bill, 2020, proposed to increase limit of abortion from 20 to 24 weeks.

USA

The U.S. Supreme Court made its first attempt to resolve the conflicting interests at the root of the abortion debate, in *Roe v. Wade*⁵⁰. The case challenge to a Texas law which made all abortions, except those necessary to save the mother's life, illegal. The Court held that the unborn child does not qualify as a constitutional person and hence, does not enjoy the right to life. In *Roe*, the Court also held that the right of privacy under the U.S. Constitution is broad enough to protect the right to abort. The broad trend in the U. S. after the decision in *Roe* has been one of privileging personal liberty and autonomy, and the related right to privacy, over the interests of the State. Although in *Roe*, the Court held that there is no absolute right to privacy, it also declared that this right is a fundamental one, thus paving the way for strict scrutiny of government regulations relating to abortion. Speaking for the Court, Blackmun, J. held that the State has an interest in "safeguarding health, in maintaining medical standards, and in protecting potential life."⁵¹

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

⁴⁸ *Mrs. X and Ors. v. Union of India* 2017 SCC OnLine SC 124

⁴⁹ *Dr. Nikhil Datar v. Union of India & Others* (WP(C) 7702/2014)

⁵⁰ 410 U.S. 113 (1973)

⁵¹ *ibid*

the extent that it reasonably relates to the protection of maternal health. Finally, beyond the period of viability, the State may prohibit abortion, except where it is necessary to preserve maternal health.⁵²

Some aspects of the decision in *Roe*, that is the rigid trimester framework and the there is fundamental right to abortion, have been rejected in the case of *planned parenthood of southern Pennsylvania v. Casey*⁵³. However, the court once again recognized that pregnancy has too great an impact on a women's life and body for the state to prevent from avoiding such impact, and deciding to abort the foetus.

U.S. courts have protected the woman's right to abort. Mere is distinctly different from conferring a person other than the pregnant woman. the husband's legitimate interests in participating affording him an opportunity to influence decision. Thus, the U.S. judiciary has erred to the husband's legitimate interests in procreation potential life of his unborn child. It may long way to go before U.S. courts can be balance between a pregnant woman's right and her spouse's interests.

South Africa

Two constitutional challenges to the CTOPA - The Christian Lawyers Association (CLA) claimed that the CTOPA violative of section 11 of the Constitution "the right to life". That section 11 was held 'from the moment of conception' and protected the right to life of 'unborn children'.⁵⁴ According to Ministry of Health an 'exception' for such claim to be not allowed as having no basis in law as Section 11 could not be interpreted in a way to give a foetus a constitutional rights, especially in contravention of constitutional rights of women's "right to choose abortion".

The court agreed that in the absence of any expressed inclusion of foetal rights, in constitution and in view of the Constitution's explicit right to women make decisions of her own of reproduction and of security and control over her own body in section 12(2), as well as rights to equality, dignity, privacy and healthcare, the Constitution of south Africa clearly granted women the right to choose to terminate pregnancies at her own will. The judge found support in comparative law, citing US (*Roe v. Wade*⁵⁵) and Canadian (*Tremblay v. Daigle*⁵⁶) cases as precedent for his conclusion that a foetus does not enjoy a constitutional right to life.

⁵² *ibid*

⁵³ *Casey*, 505 U.S. 833, 912 (1992)

⁵⁴ *Christian Lawyers Association I* (n 5) 1117-18

⁵⁵ *Supera Note* 53

⁵⁶ (1989) 62 DLR (4th) 634 (Canadian Supreme Court)

later in year 2004, the CLA challenged the CTOPA's provisions that allowed adolescent girls to choose abortion without the consent of, or consultation with, their parents.⁵⁷ The court concluded that the regulation of the termination of pregnancy of a girl's and any of woman under the said Act is her "informed consent". No woman, regardless of her age unless she is capable of giving her "informed consent" to the termination her pregnancy.' This clearly indicates that girls who had capacity of emotional and intellectual to consent, as opinion by a medical practitioner can terminate as per their will regardless any age. Court referred to a reference of supported in common law and the Constitution. South African court accordingly dismissed such claims as having no basis in law.

VIII. CONCLUSION

In the overall analysis, State policy seeking to achieve population growth through abortion laws basic philosophy guiding State action in area of reproductive rights in the India. There is a need for judicial or legislative intervention to clarify the many legal issues involved. Equally pressing is the need to sensitize the legislature and the judiciary to the fact that reproductive choices are personal choices with which the State must not interfere lightly. In this regard, Indian policy makers and judges have much to learn from the evolution of reproductive rights in the United States. The challenge lies in the spirit behind the recognition of reproductive rights, and applying it to solve the social and legal dilemmas peculiar to India.

The U.S. judiciary's attitude towards reproductive rights has undergone drastic transformation in the last half-century. In a string of decisions, beginning with *Roe*, the narrow outlook in *Buck* was abandoned for a more liberal stand. However, it would be naïve to believe that the U.S. courts have achieved the perfect balance of interests in issues involving reproductive autonomy, such as abortion, and forced sterilization.

While Current abortion legislation in South Africa and its interpretation have succeeded in restricting access to safe abortion procedures, particularly for indigent women, but, on the other hand, failed to contain the number of unsafe abortions. The. Removal of the criminal stigma of abortion will be necessary if greater involvement of health and social workers is to be obtained in support of the reproductive health and social well-being of these women. The acceptance of a notion of self-efficacy and responsibility in health is hampered when people are denied access to all possible means of dealing with unwanted and unplanned health outcomes. The majority of abortions in South Africa are requested by young and/or single

⁵⁷ Sections 5(2) and (3) of the CTOPA 1996

women on the basis of mental health or socio-economic hardship. It would be a futile exercise for legislators to try to distinguish between the two reasons, or to determine whether there has been contraceptive failure. The question is whether it should be necessary at all for a woman to justify her needs in the eyes of the law.

IX. RECOMMENDATIONS

- Need to amend the MTP Act through women centric approach abased on rights, including
 - Providing for the legal basis to terminate of pregnancy at any gestational stage.
 - Increase the number of providers who can legally perform abortions before 12 weeks on request.
 - No judicial and medical board authorizations for an abortion even beyond 20 weeks of pregnancy.
- Amend the Section 19(1) of the Protection of Children from Sexual Offenses Act to ensure that pregnant adolescents are in condition to have access abortion facility without risk of confidentiality, violated by mandatory clause of act.
- Amend the Indian Penal Code to decriminalize abortion to curb social stigma of abortion and thus expanding access to safe, legal procedures.
- Declare unconstitutional the 20-week gestational time period in Section 3 of the MTP Act on abortions performed for health risks.

X. BIBLIOGRAPHY

- Justice K. S. Puttaswamy and anr. V. UOI and Ors. (2010) 10 SCC 1
- 410 U.S. 113 (1973)
- Supra Note 4
- Art. 27 Constitution of the Republic of South Africa Act 108 of 1996
- Marge Berer, “Abortion Law and Policy Around the World” *Health Hum Rights*. 2017 Jun; 13–27
- Sebastian MP, Khan ME, Sebastian D. “Unintended Pregnancy and Abortion in India Country Profile Report with Focus on Bihar, Madhya Pradesh and Odisha.” New Delhi, India: Population Council; 2014
- Mary Philip Sebastian, M.E. Khan, Daliya Sebastian “Unintended Pregnancy and Abortion in India: Country Profile Report” 69-70 March 2014
- Nozer S et al. First trimester MTP using MVA: Report of a FOGSI multicentric Study across 27 clinics. *J Obstet Gynecol India* 2007; 162-166
- Patel T and Bakul L. A. 17-year review of voluntary termination of pregnancy (MTP). *J Obstet Gynecol India* 2006; 522-28
- Mehra R et al. Knowledge of emergency contraception among women coming for induced abortion. *J Obstet Gynecol India* 2006; 233-35
- Das V et al. Septic abortion. *J Obstet Gynecol India* 2006; 236-239
- Sheelamoni A, Nair MKC and Remadevi S. Contraceptive behavior of abortion seekers- A case control study. *J Obstet Gynecol India* 2007; 431-434
- The Guardian “Abortion laws around the world: from bans to easy access” 5 Jan 2016
- *ibid*
- Abortion Surveillance United States, *MMWR Surveill Summ* 2018
- South African government news agency “SA's illegal abortion rate alarmingly high” Tuesday, July 10, 2018
- Word Bank Data: Maternal mortality ratio (2015)
- Heard “Unsafe abortion in South Africa: country factsheet, Durban” *Health Economics and HIV/AIDS Research Division/ University of KwaZuluNata* (2016)

- UN, 'Report of the International Conference on Population Development: Cairo Programme of Action' (1994) A/Conf.171/13
- UN, 'Report of the Fourth World Conference on Women: Beijing Platform for Action' (1995) A/Conf.177/20
- International Conference on Human Rights, 1968
- Article 16 of the International Conference on Human Rights, 1968
- The Statute of the International Criminal Court (1998)
- United Nation declaration on Social Progress and Development 1969
- Article 4 of United Nation declaration on Social Progress and Development 1969
- United Nations Report of the International Conference on Population and Development, Cairo, 5-13 September 1994)
- Convention on the Rights of the Child (CRC) 1989
- Patrick J. Flood, "Does International Law Protect the Unborn Child?" in *Life and Learning XVI: Proceedings of the Sixteenth University Faculty of Life Conference at Villanova*
- Griswold, *supra* note 29
- *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S.
- 7 Lok Sabha Secretariat, *Constitutional Assembly Debates* 849 (rev. ed. 1999)
- *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597
- *Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1
- (2009) 9 SCC 1
- A.I.R.1995 S.C. 264
- *Tokugha Yephthomi v. Apollo Hospital Enterprises*, A.I.R. 1999
- Rosalind Pollack Petchesky, *Abortion and Women's Choice* (Northeastern University 1990) 6-7
- The Constitution of the Republic of South Africa Act 200 of 1993
- Sections 9, 10, 11 and 14 of the International Conference on Population Development in Cairo (ICPD) 1994

- Siddhi Hirve “Policy and Practice, Seminar”, December, 2003
- Rupsa Mallik “Negative Choice: Sex Determination and Sex Selective Abortion in India”, The Telegraph, March 11, 2004
- Vibhuti Patel “A Cultural Deficit, India Together” , August 2003
- Supera note 4
- ibid
- Section 2 of Choice on Termination of Pregnancy Act (CTOPA)1996
- The Abortion and Sterilisation Act 2 of 1975
- Preamble, Section 1 Constitution of South Africa, 1996.
- Rachel Jewkes and Helen Rees, ‘Dramatic Decline in Abortion Mortality Due to the Choice in Termination of Pregnancy Act’ (2005) 95 South African Medical Journal 250
- Center for reproductive rights “Reform to address women’s and girl’s need for abortion after 20 weeks India” ReproductiveRights.org 18 -19
- Ms. Z v. The State of Bihar and Others 2017 SCC OnLine SC 943
- Mrs. X and Ors. v. Union of India 2017 SCC OnLine SC 124
- Dr. Nikhil Datar v. Union of India & Others (WP(C) 7702/2014)
- 410 U.S. 113 (1973)
- ibid
- ibid
- Casey, 505 U.S. 833, 912 (1992)
- Christian Lawyers Association I (n 5) 1117-18
- Supera Note 53
- (1989) 62 DLR (4th) 634 (Canadian Supreme Court)
- Sections 5(2) and (3) of the CTOPA 1996
