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Women’s right to Abortion (Comparative Analysis concerning its Status in India and US)

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There have been numerous speculations that have been constantly rising over the years about the provision of the right to abortion to women. It is a prominent social issue that has remained stigmatised in our society over the years. Even though it involves a lot of considerable debates & controversies, one can't deny the fact that the right to abortion apart from ensuring women's rights also sanctions her right to life and liberty. In the earlier days, the right to abortion was opposed and criticized vehemently by society and was not permitted based on principles of morality. However, with due progress in time, nowadays it has been legally sanctioned by many nations after notable judgements have been laid down by the courts in several instances. However, let's not forget the fact that this is a global sensational issue and henceforth it must be viewed from a much broader perspective. Thus, this paper aims to enumerate a panoramic view of various laws underlying the process of abortion and its relevance in today's contemporary society by doing a comparative study between its status in India and the U.S.

Keywords: *medical termination, pregnancy, state legislature, gestational.*

INTRODUCTION

Every individual in society is vested with fundamental human rights. It's a pretty well-known fact that human rights are an indispensable and inalienable part of everyone's life out of which

the right to life is considered to be the most vital one. It is a supreme right from which no derogation is permitted. There have been several controversies and heated debates about the question of the Right to abortion. Today, even though it has been legalised in many countries, on the other hand, the opposition is still going on as many people still do believe that it should be legally prohibited. Reproductive rights are recognized worldwide as critical and imperative to advance women's human rights as well as to promote development. Every woman is vested with an absolute right to have control over her body.

Thus, forcing women to carry an unwanted pregnancy consequently forces them to look out for unsafe abortion, which turns out to be a violation of their right to life and personal liberty. The growing and perpetual perception that abortion is immoral ultimately lead to the stigmatization of women in society. The legal battle can be considered to be partially won by us but it's nevertheless the end of this stereotype unless and until it's morally accepted by society.

Rolling back the right to abortion is like rolling back modernity. Denying and restricting this right, just because it has been seen as a taboo all these years will have a profound impact and pushes women into an unsafe zone. The marginalized communities are the ones who are disproportionately affected as they lack the awareness and means to seek safe legal services in other countries where it has been legalized.

CONTENTS AND ANALYSIS

Factually before 1971, abortion was criminalized in India under Section 312 of the Indian Penal Code, 1860 as it was viewed as an unfair practice of intentionally causing miscarriage. It was a punishable offence in several instances unless in cases where it was done to save the life of women. Section 312¹-318² of the IPC deals with miscarriage and prescribes various punishments based on the different circumstances under which abortion is carried out. For example, anyone who voluntarily causes a woman with children to miscarry will be punished with an

¹ Indian Penal Code 1860, s 312

² Indian Penal Code 1860, s 318

imprisonment term of 3 years, and the woman who avails the services with 7 years in prison or a fine.

With societal progress gone are the olden days as the scenario has drastically changed after the introduction of the medical termination of pregnancy act in 1971. It has remained legal in India for almost more than 50 years. The Medical termination of pregnancy Act was amended in the year 2021 to facilitate the termination of pregnancies beyond the period of 20 weeks until 24 weeks. On the other hand, in the case of substantial foetal abnormalities, even beyond 24 weeks.

However, we can't repudiate the fact that even today in places where abortion is legalised, the restrictions persist in various ways. It's a wistful reality and indeed a tough pill to swallow and accept the fact that cultural and social norms play a cohesive role in inhibiting women's ability to seek reliable and appropriate medical services. This High-level stigma creates an adversarial impact and proves to be detrimental to women as it restricts them from articulating their experience to their very own family members and peers and tends to create a sense of fear and despair in them about whether and how they will be judged by society. In addition, it creates a sense of trauma which makes them feel isolated and gives the feeling that they have to pass through this experience all alone ultimately affecting the trajectory of their life. But it's high time to realise the underlying seriousness of this issue and ensure that we come up with a fruitful solution to break and overcome this harmful stereotype. Because the sooner we do it, the better for us.

WHO MAY TERMINATE A PREGNANCY?

Section 3(2)³ of the medical termination of pregnancy Act lays down various conditions and guidelines that need to be fulfilled to terminate a pregnancy. According to the aforesaid provision, a pregnancy can be terminated only by a registered medical practitioner as defined under Section 2(d) of the MTP Act⁴. It is also necessary that the RMP must meet the following requirements as mentioned below:

³ Medical Termination of Pregnancy Act 1971, s 3(2)

⁴ Medical Termination of Pregnancy Act 1971, s 2(d)

- The RMP's name must have been entered in the State Medical Register
- He/she must have a recognized medical qualification under the Indian Medical Council Act.
- He/she must have prior experience or training in gynaecology and obstetrics as per the medical termination of pregnancy rules.

Apart from this under section 3⁵ of the MTP Act, certain circumstances have been defined under which termination of pregnancy is permitted.

1) Where the length of pregnancy does not exceed 20 weeks

Termination of pregnancy is permissible on the opinion formed in good faith of a single registered medical practitioner.

- If the RMP opines that the pregnancy would endanger the life of the woman or cause grave injury to her physical or mental health.
- If it involves a substantive question of risk that upon the birth of the child, it would suffer from a serious physical or mental abnormality.

2) Where the length of the pregnancy exceeds 20 weeks but not 24 weeks

In this situation, the same opinion needs to be garnered by two registered medical practitioners.

3) Where the length of the pregnancy exceeds 24 weeks

In case the termination is being necessitated due to a diagnosis by the medical board stating that the foetus suffers from substantial foetal abnormalities then the limitation period of 20 weeks or 24 weeks as mentioned under section 3(2B) would not be applicable. Also, it is the primary duty of the state government to ensure that a board has been constituted for this purpose. And the board should mandatorily consist of a Gynaecologist, A Paediatrician, A radiologist or Sonologist, and any other members as may be notified by the state government. It is also relevant

⁵ Medical Termination of Pregnancy Act 1971, s 3

to note that Section 5⁶ acts as a relaxation for Section 3(2)⁷ in certain cases, where the termination of pregnancy is instantly necessary to save the life of a pregnant woman.

However, it is mandatory to note that it is the primary duty of the doctor to ensure that consent has been obtained out of their free will and not use any unfair methods to perform the abortion. In case a woman is below 18 years of age or suffers from a mental illness, then the doctors must get the permission of the guardian. If a doctor proceeds with carrying out the process of abortion without obtaining prior consent, then he or she can be sentenced to an imprisonment term of up to 10 years and a fine.

SIGNIFICANT AND LANDMARK DECISIONS LAID DOWN BY THE SUPREME COURT OF INDIA IN VARIOUS CASES:

- *Sarmishta Chakrabortty & Anr v Union of India & Ors*⁸

In this case, the report of the medical board stated that even if the child would be born, it still had to undergo complex cardiac surgery as there was high morbidity due to which the petitioner's prayer for termination of her pregnancy was granted by the court.

- *Suchita Srivastava v Chandigarh Administration*⁹

The above-mentioned case dealt with the termination of pregnancy of a rape victim and held that a woman's right to make reproductive choices certainly falls within the ambit and purview of Article 21¹⁰ which deals with the right to life and personal liberty.

- *Mrs. X & Ors v Union of India & Ors*¹¹

In this case, the Supreme Court reiterated the aforesaid provision of Article 21 by permitting the termination of pregnancy of the petitioner after 24 weeks of gestation period because the foetus

⁶ Medical Termination of Pregnancy Act 1971, s 5

⁷ Medical Termination of Pregnancy Act 1971, s 3 (2)

⁸ *Sarmishta Chakrabortty & Anr v Union of India & Ors* (2018) 13 SCC 339

⁹ *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1

¹⁰ Constitution of India 1950, art. 21

¹¹ *Mrs. X & Ors v Union of India & Ors* Writ Petition (Civil) No. 81/2017

was diagnosed with serious medical conditions. *Nisha Suresh Aalam v Union of India*¹²: In this case, the Supreme Court permitted the termination of pregnancy after the 28th week. In the medical report placed before the Court, it was mentioned that the foetus was said to be suffering from multiple serious neurological and skeletal anomalies. The Supreme Court allowed the termination by relying on the medical report which opined that the termination of pregnancy at that stage would not be more hazardous than spontaneous delivery at term and continuation of the pregnancy would certainly be detrimental and may cause mental anguish to the petitioners. In addition, in the case of *X v The Principal Secretary, Health & Family Welfare Department*¹³ the Supreme Court further reiterated that denying an unmarried woman the right to safe abortion results in infringement and also violates her autonomy and freedom while granting permission to terminate the pregnancy which arose out of a consensual relationship.

ABORTION IN U S

The landmark case of *Dobbs v Jackson*¹⁴ arose in 2018, where the Mississippi State legislature adopted the Gestational Age Act, which prohibited almost all abortions after 15 weeks of pregnancy well in advance before the point of the foetal ability which usually occurs at about 24 weeks. In December 2019, a bench comprising 3 judges in the US Court of Appeals upheld the ruling of the district court by reiterating a women's right to abortion. It was laid down that the states may intervene in regulating the procedures concerning abortion unless they don't impose any burden on the rights of the women, but however they may not completely ban abortion.

This ruling was further appealed before the honourable Supreme Court. The main contention put forth by the State of Mississippi is to uphold the constitutionality of the state law which prohibits abortion after the 15th week of pregnancy. They also cited the case of *Roe v Wade*¹⁵ and requested the court to reconsider and overrule the earlier decisions. In this case, the Supreme Court decriminalized abortion and gave people the right to access abortion legally across the country. On the other hand, the respondents contended before the court seeking

¹² *Nisha Suresh Aalam v Union of India* Writ Petition (Civil) No. 4117/2021

¹³ *X v The Principal Secretary, Health & Family Welfare Department* (2022) LiveLaw (SC) 621

¹⁴ *Dobbs v Jackson* [2022] 597 US

¹⁵ *Roe v Wade* [1973] 410 US 113

reaffirmation of Roe and Casey. The US Supreme Court by a 6:3 majority held that there is no prescribed constitutional right to abortion henceforth overruling Roe and Casey. However, there were several controversies and mixed opinions but ultimately the majority decision was upheld. It was declared that the constitution does not refer to abortion and thus such a right is not protected by any constitutional provision. It was held that it is high time to heed the constitution and return the issue of abortion to the elected representatives.

The Court also further laid down that the procedures undertaken in Roe were preposterous and wrong from the very beginning. And, to elaborate on it, instead of settlement of the abortion issue, it has led to unwanted chaos and consequently lead to a rise in debates and speculations due to its poor and weak reasoning. However few judges namely, Justice Breyer, Sotomayor, and Kagan expressed their dissenting opinion by mentioning that they deeply regret millions of American women who have lost a fundamental constitutional provision. They further added that the court has miserably failed and betrayed its guiding principles by overruling Roe and Casey.

“The majority has overruled Roe and Casey for only reason because it has always despised them and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.”¹⁶

The State’s interference with a women’s right to control her own body is nothing short of infringing the basic rights to equal freedom and liberty. These laws are certainly unconstitutional as they snatch away the basic autonomy of every woman. This has certainly turned out to be a black day in the lives of American women as the draconian judgement laid down by the US Court is a major setback for the reproductive rights of women and has created ripple effects globally across various countries. Apart from this, between 2019 and 2021 eight other states banned abortion procedures after six to eight weeks of pregnancy.

¹⁶ Nikhil Rohatgi, ‘Women’s right to abortion: Unpacking Dobbs v. Jackson Women’s Health Organization and the law in India’ (*Bar and Bench*, 30 June 2022) <<https://www.barandbench.com/columns/womens-right-to-abortion>> accessed 14 November 2022

CONCLUSION AND SUGGESTION

Any individual who opts to take the risk of bringing an unwanted child into this conservative society must be aware of its grave consequences as well. As mentioned earlier, in reality, abortion is a much more complicated and complex social issue than how it's seen today. If we take a close look at the statistics report globally it's rather not a flabbergasting fact at all that 58% of women who have attained the reproductive age, live in countries where abortions are broadly allowed. But while that represents the majority on the other hand 42% of women live in the 125 countries where abortion is highly restricted¹⁷.

The landmark judgement laid down in the case of **Roe v Wade**¹⁸ has certainly turned out to be a watershed moment in the fight for abortion rights. It has created a severe impact by victimising the lives of American women. The US Supreme court has certainly deviated from its duty of rendering justice and for the first time, it has abandoned its duty to protect the fundamental rights of its citizen. Even though our laws had been quite laudable but concerning their successful implementation in the longer run, it certainly requires a lot of time to bring about a notable and reformative change in society.

I feel that the government must take the requisite steps to spread awareness to make people realise the seriousness of this global issue. Apart from the government, the best way through which responsible citizens of this society can contribute is by taking proper measures to avoid indulging in these grave situations to ensure that we don't end up landing in a jeopardizing situation.

¹⁷ 'Women right's to abortion care' (MSI Reproductive Choices) <<https://www.msichoice.org/what-we-do/learn/womens-right-to-abortion-care/>> accessed 14 November 2022

¹⁸ Roe (n 15)