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Shackled Reproduction: A Comparative Constitutional Analysis of Reproductive Rights in India and The World [1]

"Woman Fined after Backstreet Abortion"[2]

Thiswas the headline in a leading South African newspaper in 1993 after which the accused woman was fined approximately 740 USD for undergoing an illegal abortion. The magistrate of the local South African Court was appalled and emphatically stated that a person *cannot play God* and that abortions were a perversity that the society needed protection from.[3]In late 2012, Savita Halappanvar, a resident of Ireland, passed away after suffering from a septic miscarriage in University Hospital Galway. Earlier, Savita had suffered from an incomplete miscarriage after which she had requested for an abortion since the foetus would not be able to survive after birth; her request was subsequently denied. Soon, she suffered from a septic miscarriage which lead to her passing. Her death sent ripples across the international community, after which the Irish Legislature moved the Thirty-Sixth Amendment of the Constitution of Ireland which ultimately resulted in the legalization of abortion in Ireland.[4]In order to delve deeper into these tragic events, this paper will analyse the constitutional nuances of reproductive rights in certain contexts. This paper will attempt to identify the extent to which the Indian Constitutional jurisprudence has developed reproductive rights. It will discuss the most prominent and contested reproductive rights after which it will also attempt to compare different judicial and state approaches towards these rights in India, United States of America and South Africa.

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[2]Guttmacher, Sally, Farzana Kapadia, Jim Te Water Naude, Helen de Pinho, Sally Guttmacher, Farzana Kapadia, Jim Te Water Naude, and Helen de Pinho. "Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act." Guttmacher Institute, December 6, 2016. https://www.guttmacher.org/journals/ipsrh/1998/12/abortion-reform-south-africa-case-study-1996-choice-termination-pregnancy-act.

[3]Ackermann, Denise M. "Reproductive Rights and the Politics of Transition in South Africa." *Journal of Feminist Studies in Religion* 11, no. 2 (1995): 117-27. http://www.jstor.org/stable/25002260.

[4]"Savita Halappanavar's Parents Hail Irish Abortion Vote." BBC News. BBC, May 28, 2018. https://www.bbc.com/news/world-europe-44274313.

At this stage, it becomes constitutionally paramount to resolve the multitude of moral and legal complications that arise as a result of this tussle that has gripped the modern society since the last century. It is important to recognise that reproductive autonomy has been recognised as a fundamental aspect of liberty and privacy in several legal systems. Reproductive Rights entail the choice of women to make decisions and to control what happens to their bodies in the sphere of reproduction.[5]In the area of civil liberties, it is incumbent on the State to strike a balance between the rights of an individual as compared to that of the society. The civil liberties and fundamental rights bestowed upon the people might often conflict each other; in areas such as reproductive rights, we often see the right to privacy, religion and liberty intermingle leading to grey areas in Constitutional law jurisprudence. The libertarian school of thought might lead towards conservation of an individual's autonomy over their body, but a utilitarian argument might lead towards keeping societal interests over that of an individual.[6]In earlier judgements and in *Puttaswamy,* the Indian Supreme Court has expanded liberty under Article 21 to include personal liberties that relate to the life and person of an individual. An extremely important aspect of these personal autonomy rights are reproductive rights. In the United Nations International Conference on Population and Development, these rights have been described in a manner where access to reproductive healthcare, legalising abortions, socio-economic upliftment of women, removal of discrimination and stigma, LGBTQ. Friendly policies, amongst others were construed to come under the aegis of reproductive rights.[7]

In order to further dwell on the nuances of constitutional reproductive rights, it is important to note that reproductive choices do affect the community as a whole, but it should be understood that it happens in a limited manner; reproductive choices, like those of matrimony and familial life fall into the domain of one's personal liberty and privacy.[8] In the context of India and several other countries, the discourse around reproductive rights revolves around

[5]Asha Moodley. "*Defining Reproductive Rights."* Agenda: Empowering Women for Gender Equity, no. 27 (1995): 8-14. doi:10.2307/4065965.
[6]Knowles, Helen J. *The Tie Goes to Freedom: Justice Anthony* M. Kennedy on Liberty. Lanham: Rowman & Littlefield, 2019.
[7] United Nations. *"Report of the International Conference on Population and Development."* United Nations Sales No. 95 XIII 18, 1995.
[8]DE LONDRAS, FIONA, and MÁIRÉAD ENRIGHT. "A Rights-based Approach to Abortion." *In Repealing the 8th: Reforming Irish Abortion Law,* 33-60. Bristol, UK; Chicago, IL, USA: Bristol University Press, 2018. http://www.jstor.org/stable/j.ctv47w44r.7.

the balancing of the interests of the individual against that of the community. Religious beliefs of the people, the intention of the state to promote potential life and a person's right to preserve their decision-making power are all central players in this conflict. In India, until the recent years, there was no landmark jurisprudential discourse on reproductive rights.[9] The *Puttaswamy* judgement made a bold attempt to bring reproductive rights in India on par with the Western world. In India, a landmark change in the judicial paradigm was brought about by the Supreme Court in the case of *K.S. Puttaswamy v. Union of India,* where a nine-judge bench of the court opined that privacy was an inalienable right which stemmed from values such as dignity and was the bedrock of the fundamental rights bestowed by the Indian Constitution. This judgement covered different aspects of privacy which included personal autonomy with regard to data, physical and mental aspects of one's body and choices amongst other areas. The Court recognised the constitutionally backed rights of women to make reproductive decisions of her body under the aegis of personal liberty under Article 21 of the Constitution of India.[10]

The *Puttaswamy* judgement led to the opening of several doors in the sphere of reproductive rights. In the course of the judgement, the bench reaffirmed another Supreme Court judgement *Suchitra Srivastava v. Chandigarh Administration* where it was held by the court that a woman was free to make her decisions in respect of completing her pregnancy to her full term, the giving of birth, and in the upbringing of her children and that these rights would fall under the notion of privacy and dignity.[11] The context of this case stems from the above-mentioned need of the state to balance individual and community interests. In this case, the Medical Termination of Pregnancy (MTP) Act was in question where a mentally unsound inmate in a government welfare institution was raped and subsequently approached the government Hospital for termination of pregnancy. The MTP Act of 1971 provided that registered medical practitioners could terminate the pregnancy of a woman if they believe in good faith that going forward with the pregnancy would endanger the life of the mother. It provided different procedural requirements for pregnancies depending on the number of weeks completed in the gestation period. As discussed above, this act constrained the right to

[9]George, Simi Rose. "Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S." Student Bar Review 18, no. 1 (2006): 69-92. http://www.jstor.org/stable/44306647.
[10]*KS Puttaswamy v. Union of India* (2012) W.P (Civil) No 494 p286.
[11]*Suchita Srivastava & Anr vs Chandigarh Administration* (2009) 9 SCC 1.

privacy of women and their bodily autonomy in favour of the state's interest to promote life and thus restrict abortions.[12] Section 3 and 5 of the MTP Act gave the right to terminate the pregnancy only to registered medical practitioners in cases where going ahead with the pregnancy would pose a great danger to the life of the women. Any other possible reasons to terminate pregnancy were omitted in the Act. The medical necessity to abort a child was restricted, and non-medical reasons, including marital rape, for abortions were absent from the Act. Justice Chandrachud, in *Puttaswamy*, was of the opinion that these problematic sections of the MTP Act will have to pass muster under the three-tiered test of legitimate state interest, proportionality of restriction and that the restriction should be valid in the eyes of the law.[13]

The Indian Constitution has no explicit mention of the right to privacy or reproductive rights. Unlike the Constitution of the United States, the Indian Constitution uses the word liberty instead of personal liberty. In this paper, focus will be directed towards judicial pronouncements of Indian and American courts in a comparative context to focus on these reproductive rights. In the discourse surrounding abortion, it is pertinent to note that the two conflicting schools of thought consist of the right to privacy and liberty of the women contrasted against the right to life of the foetus. In the United States, there exist prominent religious lobbies of the Catholic Church, certain sects of Jews and Christians who strongly argue against abortion. Activists have strongly opposed these views and have argued that statutes restricting a woman's right to abortion should be deemed constitutionally invalid on the grounds that orthodox religious beliefs triumphing over maternal health and the independence of reproductive decision-making ability would be severely hampered by such laws. In order to further highlight this conflict in the United States, it is imperative that the in the case of *Roe v. Wade*, the majority decision made by the legendary Associate Judge Harry Blackmun, be discussed. In this case, a legislation in the American state of Texas made all abortions illegal where the only exception was that abortions would be permitted when the life of the mother was in danger. The Supreme Court opined that an unborn child could not be brought to the same pedestal as a constitutional person and would not be covered under the ambit of right to life under the Constitution. The Court also held that the right to an

[12] *Ibid.*
[13] George, Simi Rose. "Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S." Student Bar Review 18, no. 1 (2006): 69-92. http://www.jstor.org/stable/44306647.

abortion would be covered under the right to privacy.[14] In the decisions following *Roe,* the United States Supreme Court largely upheld this decision and gave a higher priority to the rights of privacy and liberty over state interests in reproductive choices. Blackmun, J., while delivering the majority judgement, was transparent in saying that the right to privacy and the state's interest in protecting its citizens' health and life was justified, but pregnancy has an impact on the physical and mental health of an individual and thus would not be sacrificed in favour of the interests of the state. This judgement was pivotal in introducing the trimester division of pregnancy in the law. It was opined by the court that any abortion in the first trimester did not pose any danger to maternal health and hence needed no state interreference. In the second trimester, the state could reasonably regulate abortions to protect maternal healthbut in the third trimester, the state could regulate the plausibility of a safe abortion. [15]

It is important to draw a parallel to existing Indian abortion laws which follow the trajectory of the impugned Texan legislation; in India, a woman is only permitted statutory abortions if her life is in danger, the unborn child has certain abnormalities, pregnancy has been caused due to rape or has been caused by failure of contraceptives when used by a married couple. It should be noted that in India, state policy has leaned towards giving a higher degree of preference to state interests over personal rights of liberty and privacy. According to Section 312 of the Indian Penal Code, abortions are prohibited, but the MTP Act provides exceptions to the same as discussed earlier. The Indian State, since the 1970s, has been partially pro-abortion. Although this seems to be a step in the right direction, but counterintuitively, this has stagnated the activism for abortion beyond the exceptions of the MTP Act and in accordance with the constitutional mandates of privacy and liberty. It is important to highlight the differences in India and other Western systems where spousal consent plays a significant role in determining the question of abortion and other reproductive rights. The Supreme Court of India, in *Samar Ghosh vs Jaya Ghosh*, adjudged that termination of pregnancy without the consent of the husband would amount to cruelty. It also extended the same rationale to vasectomies and tubectomies without spousal consent.[16] In comparison to this, the American Supreme Court in *Roe* was significantly more aware of the physical and mental impact of a pregnancy and abortion on women. *Puttaswamy* sets the

[14] *Roe v. Wade* 410 U.S. 113 (1973).
[15] *Ibid.*
[16] *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511.

groundwork for potential action for reproductive rights as it lays the bricks for dignity on which a more reproductive rights focused question of law could be settled. In the area of consent, the United States Supreme Court in *Bellotti v. Baird,*has clarified that parental consent is not always mandatory to obtain an abortion for minors. Several riders have been placed by the Court where parents need to be given a notification, amongst others, in accordance with state laws prevalent. In the recent years, landmark judgements like *Roe* are under threat of being overturned by more conservative Supreme Court judgements. In *Planned Parenthood v. Ashcroft,* the Court has set forth on a trajectory towards establishing parental consent for abortions for minors.[17]

It is also pertinent to discuss the case of South Africa with respect to cases of India and United States as discussed above. In the South African Constitution of 1996, there was an explicit mentioning of rights to reproductive health, freedom of decision-making and bodily dignity. In the context of South Africa, the it should be highlighted that orthodox Christianity heavily influences the country. In *Christian Lawyers Association (CLA) v. Minister of Health I,* it was argued that the Choice on Termination of Pregnancy Act (CTOPA), 1996, violated the right to life guaranteed by the Constitution. It was argued that from the moment of conception, the right to life should protect the unborn child. The Court did not agree with the arguments of the plaintiffs CLA and ruled in favour of the Ministry of Health after borrowing American jurisprudence in the form of *Roe v. Wade.* It held that a foetus did not enjoy the Right to Life and was not a constitutional person. The balance adopted by the U.S. Supreme Court between women's rights and state interests was deemed appropriate.[18] In 2004, in Christian Lawyers Association v. Minister of Health II, the CLA argued that the CTOPA permitting adolescents to abort their children without parental consent was in violation of the state's constitutional duty to protect the interests of children. It was argued that children were incapable of making informed decisions and should be subject to mandatory parental consent and counselling. The Court held that the abortion statute required the informed consent of any woman wanting to undergo an abortion and hence if the woman had the intellectual and emotional capacity to provide her informed consent, then that shall be sufficient regardless of her numerical age. The Court relies on American and Canadian jurisprudence and highlights that unlike other constitutions, the South African Constitution has explicit mention of

[17]*Planned Parenthood v. Ashcroft* 462 U.S. 476 (1983).
[18]*Christian Lawyers Association v. Minister of Health I* 1998 (11) BCLR 1434 (T).

reproductive rights and thus encouraged the enforcement of the rights.[19] It is important to discuss the position of India in the sphere of bodily autonomy. The Indian Supreme Court in *Puttaswamy* concurred with the judgement of *Suchitra Srivastava* and leaned strongly in favour of bestowing bodily autonomy in such scenarios on the women themselves. Before the *Puttaswamy* judgement, the Court in *Kharak Singh v. State of Punjab* had held that Article 21 would not cover the right to privacy under it. This decision, although overturned in *Puttaswamy*, signifies the historically utilitarian approach of Indian courts in this regard. Not only the legislative, but also the judicial approach with regard to the Right to Privacy of reproductive decisions has largely been overlooked by the legislature. It is important to note that in the context of India, one needs to account for the difference in importance given to the private and public sphere as compared to other countries like the United States of America. The Puttaswamy judgement needs to culminate into something more concrete to reduce the hassle of approaching the higher judiciary in such cases.[20]

Another reproductive right that has seen much debate in India is surrogacy. The *Puttaswamy* judgement did not have an explicit mention of surrogacy, but it laid the groundwork for the same on the basis of its reproductive autonomy rationale. In *Baby Yamji Yamada v. Union of India*, the apex court explicitly recognises surrogacy as a part of the reproductive sphere of privacy. In the Surrogacy Regulation Act, 2019, which was recently passed by the Lok Sabha, it has been stated that married couples shall only be eligible for surrogacy and it completely prohibited any form of commercial surrogacy. The manner in which this criterion has been set for surrogacy could be argued as arbitrary under Article 14 of the Constitution. This Act has excluded divorced, widowed or unmarried couples; the LGBTQ Community has also been excluded. This, in addition to the prohibition of commercialising surrogacy, has opened several grounds on which these provisions can be misused to coerce women into surrogacy without adequate legal provisions and legitimacy.

After an examination of three countries' judicial and state attitudes towards other reproductive rights, there are still many questions that are still not quite settled. The Indian and American position on spousal consent has still to be set in stone. It is important to recognise that spousal notification and consent need to be adequately differentiated and the

[19] *Christian Lawyers Association v. Minister of Health II* 2004 (10) BCLR 1086 (T).
[20] *KS Puttaswamy v. Union of India* (2012) W.P (Civil) No 494 p286.

fact that one's spouse might be a stakeholder in the pregnancy needs to be considered. The Supreme Court in *Puttaswamy* has given a new fire to the debate of reproductive rights. This judgement gives impetus to the judiciary and to the legislature to recognise the need for the successful implementation to the constitutionally guaranteed rights of liberty and privacy. It needs to be ensured that this light paves the way for a new legislation or landmark judgement where the Supreme Court again tests the boundaries of judicial activism and overreach to provide an impetus to shaping the Indian Society.

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