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**CRITICAL APPROACH TO ABORTION LAWS: A COMPARATIVE
STUDY OF USA AND INDIA**- Mansi Jain¹**ABSTRACT**

Various laws have been enacted for protecting the sexual and reproductive rights of a woman. The state has enacted laws in the name of protecting and promoting maternal health, childcare and welfare but many feminist groups argue that these laws instead of protecting maternal health are more of a restriction on their autonomy to choose and take their own decisions concerning their reproductive health. The paper examines such restrictions imposed on a woman's decision specifically on their choice to perform an abortion. Further, the paper examines the legal validity and acceptance of abortion as a right in the United States and India. The paper provides a comparative study of both the countries' perspectives on abortion as a fundamental right, analysing the recent supreme court judgments laid down in relation to abortion rights and providing a critical analysis of the subject matter.

INTRODUCTION

The issue of abortion rights has always been at the forefront globally. There has been an "abortion debate" worldwide which has settled into a system of dichotomies where one side argues for recognition of a woman's autonomy to choose her sexual and reproductive rights favouring abortion and the other side argues for the value of the life of an unborn child, being against abortion.²This restriction imposed on women denies them access to abortion in complicated situations where abortion is necessary not only for medical reasons but also for psychological, sociological, emotional and financial reasons. There are various instances where women are left with no choice but to either self-abort, which is way more harmful or to kill themselves. States enact laws in the name of protecting and preserving women's

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² Jeannie Ludlow, Sometimes, It's a Child and a Choice: Toward an Embodied Abortion Praxis, 20 NWSA Journal 26 (2008).

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reproductive and maternal health but it is more of an obstruction imposed on women's reproductive health choices. While creating these stringent laws the state never considered the circumstances of a woman as to why is she willing to kill her foetus. According to the data collected by World Health Organisation, approximately 5 Lakh women die because of pregnancy-related issues under which around 50% of women die because of unsafe abortion.³ The four main reasons for which women choose abortion are: they are unaware of the pregnancy, they cannot afford a child financially, pressure from the family and the last one is that they require more time to decide to have a child.⁴

A woman's sexual and reproductive relations have always been a sensitive issue in society and are directly related to morality. It is believed that if women could enjoy sexual relations without worrying about social stigma or pregnancy, then the morals and social norms would be in jeopardy. The CEDAW General Recommendations also account for protecting the reproductive rights of women. Abortion has always been a debatable subject in the United States and India since the 1970s. There has been a huge political interference, feminist movements and judicial pronouncements concerning abortion which the author emphasises upon. The paper is divided into three chapters, wherein, the first chapter discusses the historical evolution of "abortion laws in the United States and India". The second chapter further discusses the current scenario concerning abortion laws in both countries, discussing the recent Supreme Court pronouncements along with a "comparative study of the abortion laws of India and the United States". The chapter also provides a critical analysis of the judicial attitude towards the matter. Chapter three includes an analytical approach to "women's right of choice", that is, her "right to decide to perform an abortion without any state interference", "establishing abortion as a fundamental right".

HISTORICAL EVOLUTION OF "ABORTION LAWS IN THE UNITED STATES AND INDIA"

Initially in the 1970s, the "United States" had a utilitarian approach to the abortion rights of women. In one place, there existed "a conflict between the ideals and beliefs of the community and the state's intention to protect maternal health and the life of the foetus and on the other hand, the women's right to abortion autonomy". In India, the scenario was even

³ Rebecca J Cook, International Human Rights and Women's Reproductive Health, 24 Studied in Family Planning 73 (1993).

⁴*id.*

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worse as compared to the United States as women had no say in their reproductive choices. The sole purpose of a woman's life was considered to be reproduction and abortion was considered a moral sin. This social evil was prevalent in the United States too but was at its peak in India.

The concept of abortion rights can be traced back to the debate on right to privacy. Neither the Indian constitution nor the constitution of the United States recognised the right to abortion or procreative choices explicitly. "The United States Supreme Court recognised the right to privacy as an element of liberty under the due process clause" in its decision in the case of "Griswold v. Connecticut"⁵. Thus, after the judgment, "the right to procreative choices fell under the ambit of the right to privacy", and the state could not interfere with the same. Later the "United States Supreme Court" in the case of "Roe v. Wade"⁶, the court introduced the trimester system, wherein, during the first trimester the women had an absolute right to abortion without any state interference. Later, when the foetus attains viability, the state will then interfere in protecting and preserving maternal health. This case was later upheld in "Planned Parenthood v. Casey"⁷, where it was held that "the state has legitimate interests in protecting maternal health". It was further held that the wife does not require the permission of the husband for opting abortion. The trimester system was substituted with the undue burden test which said that no undue burden was imposed on a woman when her abortion rights are restricted. In 2003, the "Partial Birth Abortion Ban" was enacted and a medical procedure named Dilation and Extraction (D&X) was eliminated from abortion techniques because it was found to be politically disturbing. This method was the only method through which a foetus can be aborted without any pain or complications, thus, the argument that the state protects and preserves maternal health and does everything for the greater good of the community is contradicted. Till 2022, the judgment laid down in *Roe* was the law of the land which was overturned by the court in "Dobbs v. Jackson"⁸.

"In India, the right to privacy is embedded under Article 21 of the Indian Constitution", which recognises the term "personal liberty" as compared to the term "liberty" used under the United States Constitution. This proves that the state intends to provide only specific protection concerning liberties related to life and person, keeping a narrow approach.

⁵Griswold v Connecticut, [1965] S.C.C.OnLine 381 (U.S.)

⁶Jane Roe v Henry Wade,[1973] S.C.C.OnLine 20 (U.S.)

⁷1992] S.C.C.OnLine 843 (U.S.)

⁸ [2022]' S.C.C.OnLine 597 (U.S.)

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However, the Indian Supreme Court, through its various decisions has given a wide ambit to the term "personal liberty". But the right to abortion has never been recognised as a fundamental right under the right to privacy, which shows that there exists a conflict between the right to privacy and recognition of individual rights. Thus, initially, India had a utilitarian approach to these rights. One of the major reasons why the judiciary's approach has been so restricted is that the Indian society is conservative in nature and respect for the private sphere of an individual is not valued in Indian society in comparison to "the United States". However, the "Supreme Court of India" in the case of "Javed v. State of Haryana"⁹, held that reproductive choices are embedded in "Article 21 of the Indian Constitution" which is "subject to reasonable restrictions". Apart from this, "abortion is criminalised in India" under "Section 312 of the Indian Penal Code, 1860". Later in the 1960s, the Shantilal Shah Committee was constituted to investigate abortion matters in India. The committee suggested that abortion laws should be liberalised in India which led to the enactment of "the Medical Termination of Pregnancy Act, 1971" which allows the abortion of a woman whose pregnancy causes grave injury to one's physical or mental health.¹⁰ However, before the 2021 amendment of the Act, the provision only applied to married women, which shows the gravity of the narrow-mindedness and restrictive nature of the laws. A major criticism which can be drawn from this liberalisation policy is that by restricting a woman's choice to abort and leaving the decision of abortion with the state, judiciary, and medical practitioners instead of women, how can one say if the abortion laws have been liberalised in India?

CONTEMPORARY SCENARIO AND JUDICIAL ATTITUDES

According to the above discussion, it can be ascertained that the United States had minimal interference in the abortion rights of a woman, whereas, In India, state policy emphasised more on protecting community thoughts and beliefs instead of protecting maternal health. However, the scenario has turned upside down after the "recent decision of the Supreme Court of the United States" as well as "the Supreme Court of India".

The Supreme Court of the United States in the case of "Dobbs v. Jackson"¹¹ has overruled its landmark decision laid down in "Roe v. Wade"¹² and "Planned Parenthood v. Casey"¹³ and

⁹Javed v State of Haryana,[2003] S.C.C. 369 (India)

¹⁰ Simi R. George, 'Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S.', 18 Student Bar Review 69 (2006)'.
¹¹[2022] S.C.C.OnLine 597 (U.S.)

¹²Jane Roe v Henry Wade,[1973] S.C.C.OnLine 20 (U.S.)

¹³Jane Roe v Henry Wade,[1973] S.C.C.OnLine 20 (U.S.)

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held that the right to abortion is not embedded in the due process clause of the United States Constitution, neither fundamentally nor substantively. Abortion after a period of 15 weeks gestation is now banned in the United States. The court overruled all the previous judgments it laid down in favour of the right to abortion. This decision of the court has been criticised all over the world, and people have taken up the roads to protest, that the decision will be the major reason for deaths due to illegal abortions and suicides. Some call it a 'shameful decision' and some call it 'wise'. The decision is criticised majorly on the issue that, now, women will be forced to raise a child, which they never wanted to give birth to. This situation will also lead to increased cases of depression and suicides in the United States.

The judges have failed to understand the agony and circumstances, that a woman has to face while carrying a child and the circumstances where a woman is not able to raise her child, due to psychological or financial reasons. Another point of criticism is that after criminalising abortion, the court did not even consider providing some relief in the form of allowance or assistance to those women, who are incapable of raising their child, for any reason whatsoever. It seems like the state and the judiciary is punishing us, women, for having sex. The president of the United States, Mr Biden, also criticised the apex court for its decision against abortion rights. The UN Human Rights Experts also called upon president Biden to take necessary measures to mitigate all the harmful impacts that this decision can lead to and called it a 'monumental setback' which takes away a woman's right to liberty and dignity. With this decision, it can be said that the United States has disregarded its international obligations, especially the International Covenant on Civil and Political Rights, which liberalised the abortion rights of a woman.¹⁴ After analysing this decision and public opinion, one can say that the United States has now adopted a utilitarian approach to abortion rights.

On the contrary, after analysing the recent decision of the Supreme Court of India, in the case of "X v. Principal Secretary Health and Family Welfare Department"¹⁵, one can infer that the court took a libertarian approach in deciding the abortion rights of a woman. The restriction imposed on woman's autonomy has been removed and the court has recognised that women have the sole authority to decide to terminate the pregnancy and the state can in no way

¹³[1992] S.C.C.OnLine 843 (U.S.)

¹⁴Simi R. George, Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S., 18 Student Bar Review 69 (2006).'

¹⁵ [2022] S.C.C.OnLine 905 (India)

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interfere with her “right to choice of abortion”. In the case, an unmarried woman wanted to pursue an abortion of a 24-weeks-old foetus, as her partner had left her and she did not want to raise a child as a single parent, as she did not have enough financial resources. The case was first filed in the Delhi High Court, where abortion was denied to her, and the judge brutally commented that “she could give birth and then leave the child for adoption”. This comment shows the patriarchal nature of our society and the disrespect that the community has for women and their rights. Further, when the appeal was made to the Supreme Court, it was held that an unduly restrictive view must not be taken when deciding abortion cases, especially when there is no harm to a woman's life. It was held that the 2021 amendment of “Section 3 of the Medical Termination of Pregnancy Act” has substituted the word ‘husband’ with ‘partner’, which shows that the legislature intended to provide the benefits of the act to an unmarried woman. It was further held that compelling a woman to go through an unwanted pregnancy is against the legislative intent and the purpose of the legislation.

Thus, it can be said that the Indian court adopted a libertarian approach to the abortion rights of a woman. Restricting the woman's autonomy is considered as a violation of her dignity and the court contended that with the change in the societal norms, law must also change. Further, the judgment held that a woman (except who is a minor) does not require any one's consent to legally abort a child. The court recognised the woman's right over her body and that no third party shall interfere with that right, as it will be a violation of “Article 21 of the Indian constitution”. “Section 312 of the Indian Penal Code, 1860”, provides for a third-party interference to the extent that such abortion is prevented in good faith or “to save the life of a woman”. However, the judgment can be criticised on the point that it says that the abortion shall be done in accordance with the provisions in the “Medical Termination of Pregnancy Act, 1971”, where Rule 3B specifies a category of women, eligible for abortion, whereas, in the said judgment, the court has held that any woman can choose to abort an unwanted pregnancy. Thus, there is some ambiguity in the court's decision. The court also recognised that the restrictions imposed “under Section 312 to Section 316 of the Indian Penal Code” fails to differentiate between wanted and unwanted pregnancies, thereby, denying the women the right to access safe abortions. And to tackle this menace, “the Medical Termination of Pregnancy Act” was drafted, “to provide women with certain right to safe abortion”. The court has considered that criminalising abortion was wrong on the part of legislature to some extent. However, the only restriction imposed is that the right to abortion is allowed only

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before the completion of 24 weeks of pregnancy and for abortion after the completion of such period, the state interference is allowed, to ensure safe abortions.

IT'S MY RIGHT TO ABORT

The liberals argue that the state should not restrict the personal autonomy of an individual, whereas, the utilitarians argue that any action that a state takes is for the betterment of the community at large. In India, there is an ambiguous approach adopted to recognise the right of life of an unborn child as "Section 416 of the Code of Criminal Procedure, 1973" gives power to the "High Court" to "postpone the execution of a death sentence of a pregnant woman". Thus, it indirectly recognises the "right to life of an unborn child". Similarly, "Section 312, Indian Penal Code, 1860" also recognises "voluntarily causing miscarriage by a third party as a criminal offence", recognising the "right to life of an unborn child". However, in the recent decision of the Supreme Court, as discussed above, the court has considered the "right to life of a woman" above the "right to life of an unborn child", thus, indirectly denying that an unborn child has a "right to life". Further, the "right to life of an unborn child" was also denied by the "United States Supreme Court" in "Roe v. Wade".

Examining and understanding the above purview regarding abortion laws, it can be said that India has taken a liberal approach concerning abortion laws as compared to the United States. Further, by restricting "a woman's right to abortion", it cannot be agreed that the state is protecting these rights for the greater good of the community. The restrictions imposed seem to be a discrimination against women with respect to a gender-specific issue and are patriarchal in nature. It is also against the international conventions and treaties like the International Covenant on Civil and Political Rights which advocates for providing abortion rights and reproductive and sexual rights to a woman. The criminalisation of abortion takes away women's autonomy and prevents them from access to safe medical health services. Instead, it leads to an increased number of pregnancy-related deaths and in some cases, it might lead to suicide. According to the British Medical Journal, many women choose to kill themselves as a better option instead of raising a child which they cannot afford to raise.¹⁶ Suicide attempts and self-abortions seem easier when one is compelled to suffer through an unwanted pregnancy.

¹⁶Charlotte Bunch, Women's Rights as Human Rights: Toward a Re-Vision of Human Rights, 12 Human Rights Quarterly 486 (1990).'

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Pro-life activists argue that life is given by the almighty and one cannot take away that life through abortion, which is the sole reason for which abortion is criminalised. The author believes that when a child is conceived, it is the woman who shall have the first say in whether she wants to have it or not, as she is the one who has to suffer through all the pregnancy pain and agony. If she does not consent to the same, then her decision should not be influenced by third parties. The restriction imposed on these rights and the state interference act as a limitation on a woman's autonomy to choose parenthood. Another criticism can be that protecting reproductive health implies that the state should protect the physical, mental and social well-being of a woman and instead of protecting it, the state regulates the fertility decisions of a woman. If the state would have been concerned about a woman's reproductive health, it would have considered the negative consequences that a woman has to face due to restricted abortion rights. No mother would ever want to kill her child, there exists an emotional connection between them, which the state fails to recognise. It is high time, that the state needs to recognise abortion as a fundamental and absolute right of a woman which facilitates her right to dignity, right to choose to be a parent, right to proper medical healthcare facilities and most importantly, the legitimate protection of her sexual and reproductive rights.

SUGGESTIONS AND CONCLUSION

From the above discussion, it can be concluded that a restrictive set of laws have been enacted by the state which provides lesser legitimacy to women concerning their sexual and reproductive rights, especially abortion rights. The study of the recent judgments of the "supreme court of the United States" show that the country has have adopted a restrictive approach which can be considered as discrimination against women, as abortion is a gender-specific matter and India has adopted a liberal approach considering right to abortion as a part of "right to life under Article 21 of the Indian constitution". A utilitarian approach is adopted in the United States, which bans abortion in the country and recognises the right neither substantially nor fundamentally, whereas, India has adopted a libertarian approach after the 2021 amendment of the "Medical Termination of Pregnancy Act" and the recent judgment of "the Supreme Court", abortion rights in exceptional cases have been granted to women, but they are subject to state interference after the completion of 24 weeks period. By adopting a restrictive approach, the state has failed to recognise and understand the agony and emotional and physical trauma which a woman has to suffer due to unwanted pregnancy. There can be

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several reasons for which she decides on abortion. These reasons could be lack of knowledge of pregnancy, not ready for parenthood, financial incapacity, a broken relationship with the partner, no support from family and many other social, psychological, cultural and financial reasons. In such cases, if a woman is compelled to suffer through pregnancy, it can lead to cases of severe depression which might further trigger suicide or self-abortion.

The state must provide autonomy to women regarding their sexual and reproductive rights, which include their physical, mental, and social wellbeing. It is necessary to recognise that women are not baby-making machines and that their decisions and choices are equally important as men, and there is no need for unnecessary state interference or judicial interference when a woman chooses abortion. Consider the trauma which the petitioner in "X v. Principal Secretary Health and Family Welfare Department"¹⁷ had to go through when she was denied abortion by the Delhi High Court, and even if in the appeal to the Supreme Court of India, she was allowed abortion, the question remains the same: Why do I have to ask for the state's permission, when I do not want to continue the pregnancy? Similarly, the amount of trauma faced by the women in the "United States" after the court's decision in "Dobbs v. Jackson"¹⁸ cannot be assessed. Consider the number of pregnancy-related deaths and illegal abortions which are going to take place after this decision. Thus, it is high time that the state recognises their responsibility towards legitimately protecting the reproductive rights of women, instead of restricting them, which is a bigger issue in the contemporary scenario.

¹⁷ [2022] S.C.C.OnLine 905 (India)

¹⁸Thomas E Dobbs, State Health Officer of the Mississippi Department of Health, et al v Jackson Women's Health Organization, et al.,[2022] S.C.C.OnLine 597 (U.S.)

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