Abortion Questions Answered Differently By Two Common Law Nations: A Comparative Study Of The Abortion Jurisprudence In India And USA

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Abstract

The present study aims to analyze, with the assistance of doctrinal method, the abortion policy of the two common law countries, i.e., USA and India, to identify and examine the points of convergence and divergence. Contrary to the popular presumption that two nations following the same legal tradition would have similar, if not identical, position on most of the matters. This study aims to illustrate how attitude of two nations with same legal tradition may vary depending on a plethora of factors and relate the same to the specific historical event or context that motivated such reformation. Abortion has always been one of the major political, thus very controversial, issue in USA , in the past few decades it has gone under fundamental reformation. Similarly, in India the recent 2021 amendment have brought substantial changes in Indian abortion jurisprudence and reconstructed the same to a towards a more progressive direction.

While acknowledging the distinctions in law and its actual practical application, in the following research paper, the researchers will try to bring out distinctions between the abortion law in USA and India, by first briefly summarizing the said two nation's position on matter and then undertake a comparative analysis of the two jurisdictions on issues like recognition of abortion as a right, decisional autonomy, mandatory counselling and waiting period, minor consent, spouse consent, rape and incest exception etc.

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I. Introduction

Neither India nor USA recognizes the right to abortion explicitly. In USA it is derived as one the element of "liberty protected under Due Process Clause" of American Constitution. Similarly, in India it could be derived from Article 21[1]of Indian Constitution which is a "counterpart of Due Process Clause" of American Constitution and gives right to women to make reproductive choices. But abortion rights have unfortunately not received much focus in India as in the West, especially USA. Therefore, to understand the contours of the discourse surrounding the abortions laws in India one can study position of abortion laws in USA.

No study of a concept could be held to be sufficient without relating it to the historical context. Evaluating any idea from the historical stance aid us to interpret and explain occasions or events of the past, or even the future, rather than just arbitrating them by contemporary standards. Thus, the present paper is structured in a way that first basic understanding of the legal position of USA and India is established before proceeding with comparative analysis.

II. US Position On Abortion

In America, "*Abortion is one of the most controversial issues*[2]" and has divided the country into two groups i.e. "pro choice" and "pro life". The advocates of pro choice claim that the women have the right to make reproductive choices. They are the ones who support abortions. The advocates of pro life claim foetus qualifies as a "constitutional person" and has a right to life. They are the ones who are against abortions. They are mostly those who are guided by "religious beliefs and include the Catholic Church, fundamentalist Protestants and Orthodox Jews"[3]. Although these debates have arisen in the early seventies only, the picture regarding abortions was quite different before that.

[1] Justice K S Puttaswamy v. Union of India, [(2017) 10 SCC 1]

[2]Neil Nevitte, William P. Brandon and Lori Davis, "*The American Abortion Controversy: Lessons from ross-National Evidence", Politics and the Life Sciences*,Vol. 12, No. 1 (Feb., 1993), pp. 19-30 (12 pages), Published by: Cambridge University Press.

[3] Krishna Gupta, Women, Law, And Public Opinion, 74 (2001)

After independence different American states had adopted English Common Law for dealing with the issue of abortion. When Lord Ellen borough's Act of 1803 was passed in the Britain which had made abortions illegal in Britain. Various anti-abortion statutes had then expanded the Common Law in US in 1820s. First anti-abortion law which was passed in US in the year 1821 was the Connecticut Law, which was targeted against the poison sold to women for inducing abortions.[4] Later on in the mid and late 19th century doctors started campaigning to forbid abortions, their concern was to abolish the competition created by unwanted healthcare providers. By 1900, legislators had to enact laws banning abortions in most of the States that raised questions pertaining to woman's autonomy. For some courts this was an absolute right and for others this right was inferior to rights of an unborn child. Apart from legal events there were social events also, like in the years 1964-1965, a Rubella epidemic had resulted in the births of more than thirty thousand deformed children, Thalidomide, a sleeping pill had caused thousands of birth defects in US.[5] Which led to lawyers, organizations single issued associations and feminist groups mobilizing movement for deregulation of abortion laws.

But abortion became legal in all the states of US in 1973 only, after the case of *Roe v. Wade*[6] which recognized a pregnant woman's constitutional right to abortion in US. Justice Blackmun said that right to abortion is a part of liberty protected under Due Process Clause in fourteenth amendment to US constitution and that prohibiting abortion infringes woman's right to privacy. He also observed that this right is not absolute and that it should be balanced against state's interest of protecting unborn life. While applying the strict scrutiny test, the court said that the regulations imposing limitations can only be justified by 'compelling state interests', as right to abortion is a fundamental right. Court in this case had rejected the claim that fetus is person. This case had laid down a *trimester test*, according to which the government could not prohibit the abortion but could only regulate in first and second and in third trimester it can prohibit abortions except to save the life or health of the mother.

In 1989, in the case of *Webster v. Reproductive Health Services*[7] the court had upheld the *fetal viability test* on the ground that it furthers interest of the state in protecting life. Trimester test was

[4] Samuel W. Buell, *Criminal Abortion Revisited*, New York University Law review (1991)
[5] Eugene Quay, *Justifiable Abortion-Medical and Legal Foundations* GEO. L.J. (1960)
[6] 93 S. Ct. 705
[7][106 L. Ed. 2d 410[

viewed as unworkable and was struck down. After this judgment the state could easily regulate the abortions even during the first and second trimesters i.e. after the very onset of pregnancy.

3 years later, in the case of *Parenthood v. Casey*[8], US Supreme Court had struck down the Pennsylvania's abortion law partially which required a women who is married to notify his husband before getting abortion done, but the court had upheld remaining provisions of this Act that required the waiting period, informed consent etc. in this case the court had reaffirmed the viability criteria but replaced strict scrutiny test with *undue burden test*.

The Supreme Court continued to be grappled with such cases, in 2007, in *Gonzales v. Carhart*[9], a federal law called Partial Birth Abortion Ban Act, 2003 banning intact dilation and extraction, a particular method of ending fetal life was challenged. The court had observed that fetus is a living organism in womb of the mother irrespective of its viable outside the womb. This judgment of Justice Kennedy was criticized on the grounds that it has narrowed the right to abortion and that the SC has moved in a conservative direction.

After the cases of *Roe v. Wade* and *Doe v. Bolton*, states began to work on abortion laws as to how to codify, regulate and limit the abortion practice. Recently, nine states have enacted strict abortion laws. Alabama law is so strict that is has somewhat put a total abortion ban on abortion.[10] 'Fetal heartbeat bills' are being passed in many states of US which make abortions after detectable heartbeat of the fetus illegal[11]. Some states like Utah make the consent of the father of the unborn child necessary for abortion. Some provisions require a judicial hearing and before an abortion, where views of even paternal grandparents of the fetus are considered important. Nearly seven states have banned abortion in first trimester only, where unborn child is considered as person regardless of its viability.

III. Indian Position on Abortion

In India, , like United Kingdom, abortion is criminal offence under Section 312-216 of Indian Penal Code which put a blanket ban over the practice. Section 312 recognized only one exception that is when the abortion/Miscarriage is caused in "good faith" to save the "life of the woman",

[8] [505 U.S. 833]
[9] [127 S. Ct 1610]
[10] Utah Code Ann. title. 76, ch. 7, § 302(3)-319
[11] K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (2019)

i.e. barring the instances when the termination of pregnancy done to safeguard the life of the woman, the section punished the abortionist as well as the woman with strict penal sanctions. Section 312 IPC is said to have its origin in UK's *Offences Against the Person Act,* 1861, which provide similar provisions. IPC employs the word "miscarriage", instead of "induced abortion" or just "abortion", KD Gaur, explains this intentional omission of usage of the word "abortion" was done as perhaps using the said term might hurt the religious and moral sentiments if the traditional Indian community.

These strict penal provisions against abortion were making women resort to unsafe or backstreet abortions, which caused high increase in death rates and other health issues. Considering this, the Indian Government appointed the Shah Committee with Dr. Shantilal Shah, a medical expert as the chairman of the committee, to recommend changes in the law. The committee gave its report in 1966. The committee's suggestions were given the shape of *The Medical Termination of Pregnancy Act,1971*. It should be noted here that this Act doesn't override S.312 IPC, the said section is very much still in force in India. Abortion is still illegal, the 1971 Act only provides exception to it, i.e. it provides the exceptional circumstance where causing miscarriage won't be dealt as a crime.

The 1971 Act is modelled on UK's *Abortion Act of 1967,* and provide almost similar provisions, but certain difference in the both acts could be recognized. One such glaring difference is the one related to 'conscientious objection clause' (i.e. objections on the basis of moral or religious ground). The said clause is purposely excluded from the Indian Act. Why was this done? Was it done to give a false impression that the changes in the abortion law is made in Indian was only for paternalistic consideration [as the statement of the objective and reasons of the act claim) and any moral and religious considerations (legal moralism) has not affected the same? Joseph Minattur [12] believes that perhaps lack of medical personnel in India was the major reason for non-inclusion of such provisions and suggests that recognition of such provisions is "essential" and even suggested the mechanism to deal with such objections if such clause is included in Indian abortion jurisprudence in the future. Another question that could be raised here is whether can one actually say the such objection could not be taken in India, when we have Article 25 that indirectly provide

[12] Joseph minattur, "medical termination of preganancy and conscienous objetion" Vol. 19, No. 1, Special Sections: Abortion and Human Rights Drug Control and Human Rights (June 2017), pp. 55-68 (14 pages)
Published By: The President and Fellows of Harvard College.

sufficient ground to raise such objections? The position of 'conscientious objection clause' vis-à-vis Article 25 is still a moot point, no judicial adjudication has yet been done on it, thus no conclusive judgment about the opinion of Indian Judiciary on it could be found.

The 1971 Act provides that pregnancy could be legally terminated without attracting Sec.312 IPC penal sanctions if; the pregnancy is up-to 20 weeks (12 weeks before 2021 amendment) if one medical practitioner and up-to 24 weeks (20 weeks before 2021 amendment) if two medical practitioners/doctor, authenticated in "good faith" that the "continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health[13]" or "*there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality*[14]".

Though the Shah Committee, strongly rejected the accusation that the 1971 Act was enacted with the aim of controlling population rate and encourage family planning, and argued that the sole aim of the act is only to increase access to safe abortions to avoid "*wastage of the mother's health, strength and, sometimes, life*[15]". But the hidden aim of controlling population rate and encouraging family planning is sufficiently highlighted by the Explanation 1 of the Act that presumes "*failure of any device or method*[16]" of contraception to constitute "a *grave injury to the mental health of the pregnant woman*[17]." The 2021 amendment Act have attached a progressive dimension to the Act by replacing the words "*married woman and her husband"* with *"any women and her partner*" in the language of his explanation.

The act makes availing informed consent of the woman essential before terminating pregnancy and in case the pregnant woman is a minor[under 18] or mentally ill than the consent of the guardian should be taken.

Though the maximum period up to which abortion is allowed is 24 weeks, can there be a situation where abortion beyond this period could be allowed? Yes, Pregnancy could be terminated even after 24-week period in case if in the opinion of the medical board there is "substantial foetal abnormality", similarly, abortion could also be allowed at any stage of pregnancy if there is

[13] section 3(2)(i),The Medical Termination of Pregnancy Act,1971.
[14] section 3(2)(ii)The Medical Termination of Pregnancy Act,1971.
[15] Statement of objects and reasons, The Medical Termination of Pregnancy Act,1971.
[16] Explanation 1, The Medical Termination of Pregnancy Act,1971
[17] Ibid.

"substantial risk to the life" of the woman. In such cases even the opinion of one medical practitioner would suffice.

Before 2021, the MTP Act 1971 contained on provision as to mandatory concealing the identity of the women resorting to abortion, but 2021 amendment have taken a progressive step towards protecting the privacy of the woman by incorporating section 5A that make disclosing the identity of the pregnant woman, expect when authorized by law, an offence. This section would be seen as a result of the *Justice K. S. Puttaswamy v. Union of India*[18] that has recognized woman reproductive autonomy as a part of her right to privacy.

Now that a basic understanding about the legal position of USA and India about abortion law is established, the next segment of the paper attempts to conduct a comparative analysis of both the nation in order to identify the points of convergence and divergence.

IV. Comparison of US and Indian Approach Towards Abortion

The Abortion law adopted by a country greatly depends on the type of legal system/tradition followed by the country. Adoption law in the common law countries is mostly based on English law and that in civil law countries mostly is based on "French Napoleonic Code of 1810, the 1939 French version of that Code or the 1979 abortion law of France[19]". But it should be noted that even in countries following same legal traditions, the abortion law may vary depending on various considerations. Abortion jurisprudence in USA showcase true features of a common law tradition, as federal abortion law in USA is majorly Judge made or court evolved. However, in India, also a common law country, abortion law is majorly legislation based with little alterations or rather clarification added by the judiciary.

While discussing these two jurisdictions one should not forget the very fact that legalization of abortion in USA is often seen as a fallout of massive feminist movements and therefore there it is seen as a matter of personal liberty of a woman and therefore the advocates of pro-abortion in USA are against the unfavorable state policies on abortions but in India the state is in favor of abortion and sees it as a tool of family planning due to demographic reasons which leaves less role for judiciary to play. One may also argue that due to the prevailing social evils like female feticide

[18] AIR 2017 SC 4161

[19] Bartha Maria Knoppers, Isabel Brault and Elizabeth Sloss, Abortion Law in Francophone Countries,The American Journal of Comparative Law, Vol. 38, No. 4 (Autumn, 1990), pp. 889-922 Oxford University Press.

and coercion from family members, women's right to choose never evoked a backlash in India as for them undergoing an abortion was never a' free choice'. On the other hand, the issue of abortion is so integral to the US politics that it is raised in almost every presidential election and often disputes take place over the medical services and judicial appointments because of it.

The most important case law with regard to abortion in USA is Roe v/s Wade which liberalized abortion law in USA recognizing women's reproductive autonomy and right to bodily integrity. On the other hand, the reason for liberalizing abortion law in India was not as a step to extend legal recognition to a woman's right to reproductive autonomy but the same was done over paternalistic consideration i.e., to protect the woman from unsafe abortions. These paternalistic consideration behind the MTP ACT 1971, are clearly illustrated by Shah Committee report and the statement of objective and reasons of the 1971 Act that states avoiding "*wastage of the mother's health, strength and life*[20]" as the major reason for its enactment. The Indian judiciary has also interpreted the provisions of the Act on paternalistic lines, for example, In *Suchita Srivastava & Anr vs Chandigarh Administration* [21], it was held that the 20 week period limit in MTP Act "*is due to the medical opinion that abortion performed during the later stages of pregnancy may cause harm to physical health of woman who undergoes abortion*[22]". Thus, the major focus of the Act as well as the Indian judiciary is on safeguarding the life of the woman rather than vesting her with the rights over her womb, perhaps this is the major reason as to why abortion on demand in not available in India unlike USA. USA judiciary has always tried to strike a balance between the interests of woman and that of State by seeing woman as an independent, isolated individual who is bound by just self-interests. This could be also attributed to the anti-statist individualism ideology of USA. In India the power to make decision as to abortion is shifted from the hand of the women to the medical practitioner(s). Certain extent of recognition to the right of women to make decision regarding her womb is provided under 2021 amendment that allows abortion in case of foetal abnormalities without any time limit.

Reproductive autonomy can be said to be fully recognized as a Fundamental Right in USA. Abortion became legal in all the states of USA in 1973after the case of *Roe v. Wade*.[23] In which

[20] Statement of objects and reasons, The Medical Termination of Pregnancy Act, 1971
[21] (2009)9 SCC 1
[22] Ibid
[23] Roe v. Wade, (93 S. Ct. 705)

pregnant woman's constitutional right to abortion was recognized under the "Due Process Clause in fourteenth amendment" to USA constitution. Though this right is not absolute and "should be balanced against state's interest of protecting unborn life" [24] it was made subjected to trimester test and compelling interest test. While applying the strict scrutiny test, the court said that the regulations imposing limitations can only be justified by 'compelling state interests', though these tests were in subsequent judgments[25] were diluted and replaced by viability test and undue burden test in which a law that unduly burdens women's liberty i.e. places some hindrance in the path of woman in getting abortion done before fetus achieves viability is invalid. Hence it became easy for the states to impose restrictions to regulate abortion laws after these tests. The Indian position regarding right to abortion was clarified by the Supreme Court in *Suchita Srivastava & Anr vs Chandigarh Administration*[26]. In this case it was held the right to make reproductive choices (which include right to decide whether to abort or to carry pregnancy to full term) which is "*an ingredient of personal liberty under Article 2*[27]" but such right is 'qualified' and "*the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices*[28]." The said case was reaffirmed by the 2018 K. S. Puttaswamy judgement.

In India, though the MTP act doesn't talk about pre or post procedure counselling, it just provide that the consent of the pregnant woman (or guardian as the case may be) must be taken before the procedure. *The Comprehensive Abortion Care: Training and Service Delivery Guidelines of 2018* however, recommends (not mandate) that the consent of the woman must be taken after informing her about all the intricacies of the procedure, method and the consequences. Thus, the main focus of such counselling is to insure "informed consent" and nothing else. The 1971 Act or these guidelines provide nothing about the mandatory waiting period. Similarly, state in US requires consent of the women before performing abortion on her, which has a threefold purpose i.e. woman should have capacity to take decision, her decision should be voluntary and she should have adequate information regarding the abortion. In addition to counselling women are also required

[24] E. G. T., "Constitutional Limitations on State Intervention in Prenatal Care", Virginia Law Review,Vol. 67, No. 5 Jun., 1981), pp. 1051-1067 (17 pages),Published By: Virginia Law Review.
[25] Parenthood v. Casey,(505 U.S. 833)
[26] (2009) 9 SCC 1
[27] Ibid.
[28] Id.

to wait for a specific period of time usually from 24 hours to 72 hours which is called the waiting period before abortion. It is often claimed that these counselling are biased and aimed at persuading the women that they are doing wrong by undergoing abortion. Also, waiting period acts as a barrier for the women to access abortions.

Even before the case of Roe v. Wade, many US states had treated pregnancies from rape as an exception in their laws that outlawed abortions. But after the viability test in the case of Parenthood v. Casey it became clear that the states could only prohibit the abortions after the viability stage and therefore almost all the states of US have laws that ban abortion after the viability, the only exception to such ban is to preserve the life or health of the mother, such laws are silent about the cases of rape. Therefore one may conclude that a woman who has got pregnant from rape can undergo abortion only before the period of viability. Though some states like Arkansas have completely prohibited abortions at all the stages of pregnancy including the cases of rape. On the other side, in case of India, one of the most progressive features of the MTP act 1971 is that the Act recognizes rape exception to abortion, in-fact explanation 2 of the act raises a presumption of *"grave injury to mental health"* in case of pregnancy caused by rape. Indian judiciary in various cases like *Sumishtha chakrborthy v/s UOI*[29]*, Neethu Narendran v/s state of Kerala*[30], etc have allowed termination of pregnancy even after 20 week limit (which was the maximum limit before 2021). In a recent 2021 judgement, *XXX v/s UOI*[31], Kerala High Court allowed termination of 26 week pregnancy of a 13 year old incest rape victim and stated "*the word 'shall be presumed' created as a statutory presumption clearly shows the intension of the legislature*[32]". The MTP 2020 Bill also suggested inclusion of incest as a special case, but the same was not included in the 2021 amendment Act.

In both the nations, consent of the pregnant woman is necessary to terminate pregnancy. What if the woman is minor? In India, in case the pregnant woman is a minor or mentally ill than the consent of the guardian should be taken. However, Parental and Spousal consent has always been a subject of controversy in US. In late seventies, in a series of cases SC of US had made the requirement of consent of parent for abolition by minors invalid.[33] But in more recent judgments

[29] (2018) 13 SCC 339
[30] W.P(c).No.24031/2020
[31] WP(C).No.9982 OF 2021(W)
[32] Ibid.
[33] Planned Parenthood of Central Missouri v. Danforth, (428 U.S. 52)

SC has become conservative by holding that State has a broader authority to regulate the activities of children[34] and by upholding the laws that regulate parental consent.[35] What about the consent of the spouse? In USA in 1973 itself Roe v/s Wade and later in Planned parenthood v/s Danforth and planned parenthood v/s Casey, it was clearly held that woman alone has right to make decision as to abortion and imposing any spousal consent restriction is unconstitutional. But Indian position regarding the same was comparatively orthodox at that time as illustrated by *Satya v/s Siri Ram* [36]case in 1983, where abortion without husband consent was held to amount cruelty. But with passing years there have been a shift in approach, In 2017 the Indian Supreme Court in *Ajay Kr. Paricha v/s Anil kr. Malhotra* [37], has clearly laid that "*abortion is an exclusive right to the woman*[38], so only consent that is material is that of the woman herself and not her spouse. Similarly, in *Dr. Mangla Dogra v/s Anil kumar Malhora*[39], has held that "*Nobody can interfere in personal decision of woman to carry on or abort the pregnancy…woman is not machine in which raw material is out a finished product comes out*[40]".

V. Conclusion

Though the abortion laws had originated in the UK as early as 1803, but the credit for revolutionizing abortion laws and recognizing the right of a woman to terminate her pregnancy under the ambit of liberty can only be given to the US more specifically to the judiciary, after the Roe v. Wade judgment. But it seems that the senators and the policy makers in several, if not all states have tried to whittle down the essence of this case by enacting legislations like the Unborn Child Pain Awareness Act, 2005 which requires abortionist to tell the women that she's killing her child which would cause pain to the child and creating financial barriers through Hyde Amendment which puts a bar on the use of federal funds to pay for abortions. Restrictions of varying degrees are imposed by different states in the form of mandatory waiting period, scripted counselling, late term abortion bans, parental notification for minors etc. And therefore it won't be wrong to assume

[34] Beiiotti v. Baird, (428 U.S. 132)
[35] Planned Parenthood v. Ashcroft, (462 U.S. 476)
[36] A.I.R. 1983 P. & H. 252, 253
[37] CIVIL APPEAL No.4704 OF 2013
[38] Ibid.
[39] 2011 SCC Online P&H 16221
[40] Ibid.

that after adopting the most liberal approach in 1973 in Roe v. Wade decision, both legislation and judiciary have moved towards a conservative direction.

US government recent Oct 2020 decision of becoming a signatory to the *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (which is a anti-abortion declaration) aims at restricting women right to abortion and provides that there is no inherent right to abortion, The justification advanced by the US government for such action was that this declaration "*defends the unborn and reiterates the vital importance of the family*[41]". This shifting of emphasis from woman to family and unborn also highlights US inclement towards anti-liberal prochoice conservative approach. However later in 2021, prochoice Joe Biden government has removed USA from the list of signatory.

Thus, it could be seen that prima facie, US's federal position of abortion is very liberal and abortion is legalised, contrarily, in India abortion is a crime under S.312 IPC but it is allowed as an exception under MTP Act 1971.

But with passing years there have been a shift in approach, the shift have been from orthodox/conservative to liberal in India and from liberal to orthodox/conservative in USA, where in spite of the federal law being so liberal, practically availing abortion is very difficult due to various restriction that are imposed by different states. Some states like Alabama have very strict abortion policy, state have put a blanket ban on abortion baring the exception of lethal foetal anomaly and serious health risk.

[41] Diana Chandler, Baptist Press, Kentucky today [October 24, 2020 11:07 am] https://www.kentucky today.com/stories/us-joins-31-un-nations-in-pro-life-family-and-womens-health-statement,28663