

Reproductive Autonomy: A Comparative Study of Jurisprudence with reference to India and the United States of America

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Abstract

This paper presents a comparative analysis of the reproductive rights jurisprudence in India and the United States. While in the United States by 2022, the abortion rights are not implicit in the concept of ordered liberty under the Fourteenth Amendment and therefore States have a right to impose limitations, in India reproductive rights are acknowledged as a facet of rights guaranteed under the constitution. This Article will explore the scope of decisional autonomy of a pregnant woman underscoring the need to expand the same.

Keywords: Medical Termination of Pregnancy, State's Interest, Undue Burden on Pregnant Woman

Introduction

Reproductive rights are central to feminist discourse. Shulamith Firestone in her book *The Dialectic of Sex: The Case for Feminist Revolution*¹ published in 1970 imagined a world where natural pregnancy could be replaced by an artificial womb enabling women to gain equality in the society. The hope was anchored in the belief that women's role as a class in patriarchal society originated in biology, that is in their ability to procreate². Simone de Beauvoir (to whom the *The Dialectic of Sex: The Case for Feminist Revolution* was dedicated) too had argued that differentiation of one human species in male and female was “for the purpose of reproduction”³. Pregnability puts women in the position of primary care givers. They are groomed to discard autonomy over their bodies to become the “giving selves”⁴. The assignment of primary role in guardianship and reproduction results in subordination and dependency of women marginalising them from public discourse. The role assigned to them becomes an insurmountable hurdle that women are expected to overcome to participate in public life, for economic, social or intellectual reasons⁵. The biological difference between men and women have been cited as justification to confine them to *traditional feminine roles* being natural in the structure of the biological family⁶ (the basic reproductive unit of man, woman and child). Shulamith Firestone had therefore hoped that by eliminating the very basis of inequality, women shall be freed from subordination and oppression.

¹ Shulamith Firestone in *The Dialectic of Sex: The Case for Feminist Revolution* 41–71 (William Morrow & Co. 1970).

² Shulamith Firestone (Chapter 1) in *The Dialectic of Sex: The Case for Feminist Revolution* Pg. 15 (William Morrow & Co. 1970).

³ Simone de Beauvoir, *Biological Data*, in *The Second Sex* 46 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011) (original work published 1949).

⁴ Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *Wis. Women's L.J.* 149, 212 (2000).

⁵ Margaret Thornton, *Feminist Jurisprudence: Illusion or Reality?*, 3 *Austl. J.L. & Soc'y* 5 (1986).

⁶ Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *Berkeley Women's L.J.* 191 (1988).

Today the world is far more technologically advanced than the times in which Shulamith Firestone's book was first published. Undeniably, contraceptive pills, in vitro fertilization (IVF) and surrogacy have transformed the concept of family but the patriarchal structures that challenge the autonomy of women over their own bodies and more importantly the division of labour based on biological difference of human species⁷ have not been dismantled. Even today, Indian as well as western societies continue to advance moral, social and religious codes that look at termination of pregnancy as a sin that violates the sanctity of life. These sentiments are reflected in the statutes governing the right to abortion in these nations. Some countries like Egypt, Jamaica and Iraq prohibit abortion outrightly irrespective of the circumstances while nations like Bahrain, Brazil, and Mexico allow abortions to save a woman's life. Nations like Israel, Malaysia, Monaco, Pakistan, and Qatar permit abortions for medical or therapeutic reasons. Some countries that have interpreted abortion laws more liberally allowing termination of pregnancy on broader social and economic grounds and some have permitted abortion on request only prescribing gestational restriction⁸. The abortion statute in each of these countries resonates with their historical and cultural influences and the impact of feminist thought on the development of jurisprudence.

The Indian Constitution explicitly elevates the equality right including gender equality to the status of fundamental right⁹ whereas the Constitution of the United States provides for equal protection without specifically recognising gender as one of the constructs¹⁰. Consequently, the Supreme Court of the United States follows a *model of formal equality*¹¹ i.e. similarly treated individuals are to be treated similarly whereas the Supreme Court of India is empowered to investigate the affirmative model envisaged in the constitution¹². Both nations have declared their unwavering commitment to liberty in the preambles of their constitution even though neither specially addresses the right to reproductive choices¹³. The Supreme Courts of both countries have interpreted the right to reproductive choices as a facet of liberty.

⁷ Shulamith Firestone (Chapter 1) in *The Dialectic of Sex: The Case for Feminist Revolution* Pg. 16 (William Morrow & Co. 1970).

⁸ Jyothi Natarajan & Srinidhi Sarayu, *Analysis of Abortion Rights Under Feminist Jurisprudence*, 5 *Indian J.L. & Legal Rsch.* 1 (2025).

⁹ See INDIA CONST. art. 14, 15 and 16

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 469 (1981).: Section 261.5 of the California Penal Code criminalized sexual intercourse with a female under eighteen but imposed no equivalent prohibition regarding males. The Supreme Court of the United States held by a majority opinion that a gender-neutral statute would be as effective as the statute has chosen to enact and rejected the argument that the Equal Protection Clause requires a legislature to enact a statute a gender-neutral statute holding that "the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded and the Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist". In *Arshnoor Kaur v. Union of India*, 2025 INSC 954 (India), <https://www.sci.gov.in/judgments> Supreme Court of India too has taken a similar view holding that "'Gender-neutral' means that one cannot be discriminated on on the basis of gender or sex but is not synonymous with the expression 'gender-equality'" and that "the concept of gender-neutrality does not just prohibit sex-based classification but it ensures that the most meritorious candidate is selected for the job."

¹² INDIA CONST. art. 14, 15 and 16 empowers the State to take affirmative action as held by the Supreme Court of India in *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, *Joseph Shine v. Union of India*, (2019) 3 SCC 39, *State of A.P. v. P.B. Vijayakumar*, (1995) 4 SCC 520, *State of Punjab v. Davinder Singh*, (2025) 1 SCC 1 *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1 etc.

¹³ U.S. Const. PmbL.:

In *Griswold*¹⁴, the Supreme Court of the United States struck down a statute as it violated the "right to marital privacy" rejecting the argument "*the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights*". Indian Supreme Court too, in *Suchita Srivastava*¹⁵ recognised the freedom to make reproductive decisions as central to one's privacy, dignity and autonomy being a facet of right to life guaranteed under Article 21¹⁶ of the Constitution of India. Article 21 of the Indian Constitution is a counterpart to the Due Process Clause¹⁷ in the constitution of the United States.

United States of America

In the year 1965, abortion was banned by all states. The ban owes its existence to Christian lobbyists, who argued that life begins at conception and scholars have identified this as a case of blurring of the traditional separation between Church and State¹⁸ assuming the role of "protector". In *Bradwell*¹⁹, the Supreme Court of Illinois having refused to grant to a woman a license to practice law on the ground that females are not eligible under the laws of that state. The rationale being that man is woman's protector and defender. The women by their nature were unfit for "civil life" and their mission was to hold "*noble and benign offices of wife and mother*". The judgments demonstrate the expectation a State has from a woman and inability of a state to understand that why a good woman can ever refuse to be a mother. However until the middle of the 19th century, the State had minimal role until "quickening" and abortions were advertised even though mostly practised by women themselves by taking up herbs and drugs that were purchased mostly from an apothecary²⁰. The movement to criminalize abortion started only thereafter and reached its zenith by the early 1880s²¹. The clergy along with physicians, more particularly the American Medical Association (AMA) founded in 1847 were the forerunners of the campaign. The argument of the physicians was that they should control the terms under which "*approved abortions*" can be performed. Scholarships have indicated that the campaign was intended to take control over the

¹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁵ *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1(India): A permission was sought from Court to terminate pregnancy on account of an alleged rape that took place while the woman was an inmate at a government-run welfare institution on the ground that the woman was mentally retarded and an orphan. Therefore there was no one guardian to look after her or her prospective child. The Supreme Court granted permission to terminate pregnancy and held that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India and the provisions of the Medical Termination of Pregnancy Act, 1971 are reasonable restrictions on that right.

¹⁶ See India Const. art. 21

¹⁷ See U.S. Const. amend. V

¹⁸ Simi George, *Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S.*, 18 *Nat'l L. Sch. India Rev.* 33 (2006), <https://repository.nls.ac.in/nlsir/vol18/iss1/3>.

¹⁹ *Bradwell v. The State*, 83 U.S. 130 (1872)

²⁰ Carole E. Joffe, *Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe v. Wade* 28 (1996).

²¹ *Ibid*

“irregular practitioners” such as healers and homeopaths and vest the physicians with monopoly to perform abortions²². The view put forth by the physicians prevailed and abortions were criminalised except those that were medically approved and performed in the hospital until the decision of the Supreme Court of the United States in *Roe v. Wade*²³ on January 22, 1973. Jane Roe (pseudonym), a single woman seeking to terminate her pregnancy, challenged the constitutional validity of the state criminal abortion legislation before the Supreme Court. A licensed physician was granted permission to intervene who had faced arrests for violations of the Texas abortion statutes. He claimed an inability, as a physician, to determine whether cases fell within or outside the statutory exception. Additionally, John and Mary Doe (pseudonyms) filed a related complaint to Roe's, asserting to be a childless couple who were medically advised to avoid pregnancy, and consequently, they purported to sue on behalf of themselves and all similarly situated couples. By a vote of 7–2, the Supreme Court enacted a trimester framework. During the first trimester, abortion decisions rest solely with the woman but in the second, the State may regulate to protect her health and after viability, it may restrict or prohibit abortion, with exceptions for the mother's health. The Catholic Church condemned it as denying life to millions of unborn children, while feminists welcomed its progressive stance on social change²⁴. Bob Woodward & Scott Armstrong in *The Justices Behind Roe v. Wade: The Inside Story* recounted a heartwarming meeting between Justice Blackmun who had authored the majority opinion and the anonymous complainant before him, demonstrates the reason why the decision is celebrated even today by feminists²⁵.

Around the same time, there was another case that if decided would perhaps have changed trajectory reproductive rights jurisprudence. A career officer in the United States Air Force (nurse unit) while serving in Vietnam became pregnant²⁶. The Airforce ordered an involuntary discharge under Air Force regulations then in effect as per which the services of a woman officer could be terminated when it is “*determined by a medical officer that she is pregnant*”²⁷. On the other hand male officers could continue working for the Airforce even if they had become fathers. This compelled the officer to file a suit for injunctive and declaratory relief challenging the regulation as unconstitutional. Justice Ruth Bader Ginsburg

²² *Ibid*

²³ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴ Bob Woodward & Scott Armstrong, *The Justices Behind Roe v. Wade: The Inside Story*, Adapted from *The Brethren* 134 (Simon & Schuster, Kindle ed. 2012).

²⁵ Woodward, Bob; Armstrong, Scott. *The Justices Behind Roe v. Wade: The Inside Story*, Adapted from *The Brethren* (p. 136). Simon & Schuster. Kindle Edition. (“Months later, Blackmun gave a speech at Emory Law School in Atlanta. He was chatting with students and faculty when a petite young woman with black curly hair ran up the steps to the stage. She squeezed through the group, threw her arms around Blackmun and burst into tears. “I’ll never be able to thank you for what you have done. I’ll say no more. Thank you.” The woman turned and ran from the room. Blackmun was shaken. He suspected that the woman was probably someone who had been able to obtain an abortion after the Court’s decision. He did not know that “Mary Doe,” the pseudonym of the woman in Georgia who had filed one of the original abortion suits (*Doe v. Bolton*), had just embraced him”)

²⁶ Lewis F. Powell, Jr., *Struck v. Sec’y of Def.*, Supreme Court Case Files, No. 72-178 (1972), <https://scholarlycommons.law.wlu.edu/casefiles/582>.

²⁷ *Ibid*

(then a lawyer) drafted the brief²⁸ raising three arguments, (1) equal protection; (2) fundamental rights; (3) freedom of religion^{29 30}. Thus instead of basing her argument on patient relationship or privacy [which was the central argument in *Roe (supra)*], she attempted to put abortion rights on the same pedestal as the other freedoms and opportunities that Fifth and Fourteenth Amendments' Due Process and Equal Protection Clauses guaranteed to women. She had then put forth her famous argument that the officer was not seeking *favors or special protection but was asking to be judged on her capacities and qualifications*³¹. The Supreme Court never heard oral argument because during litigation, the Air Force retreated from its policy and waived the discharge³².

The trimester scheme formulated in *Roe (supra)* continued to occupy field till it was overturned in favor of a viability analysis in *Planned Parenthood*^{33 34}. The issue involved challenge to the validity of five provisions of the Pennsylvania Abortion Control Act of 1982³⁵ that mandated prior spousal and parental (in case of minor) consent before the procedure. In an opinion authored by Justice Sandra O' Connor, it held the concept of viability as held in *Roe (supra)* referred to the *realistic possibility of maintaining and nourishing a life outside the womb*, which are affected by medical developments. The burden imposed by a law enacted to purportedly promote the State's interest in fetal life had the effect of imposing an undue burden on a woman's decision prior to fetal viability³⁶. With the decision, the test became whether the law placed an "undue burden" on a woman seeking to abort?³⁷ The decision reflected the sensitivity of judges to the fact the post *Roe (supra)* women gained a vital right to choose whether or not to carry a child which in turn affected their ability to participate in "economic and social life of the Nation"³⁸. The decision starts

²⁸ Corey Brettschneider, *Decisions and Dissents of Justice Ruth Bader Ginsburg: A Selection* 45 (Penguin Publ'g Grp., Kindle ed. 2020).

²⁹ Lewis F. Powell, Jr., *Struck v. Sec'y of Def.*, *Supreme Court Case Files*, No. 72-178 (1972), <https://scholarlycommons.law.wlu.edu/casefiles/582>.

³⁰ *The officer was Roman Catholic and argued that her religious beliefs were against abortion.*

³¹ Corey Brettschneider, *Decisions and Dissents of Justice Ruth Bader Ginsburg: A Selection* 46–47 (Penguin Publ'g Grp., Kindle ed. 2020).

³² Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 *Ohio St. L.J.* 1095, 1103 (2009), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2756&context=faculty_scholarship.

³³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

³⁴ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986): Despite *Roe v. Wade*, 410 U.S. 113 (1973) some States continue to test the limits of rulings. *Webster v. Reproductive Health Services*, 492 U. S. 490 (1989) the trimester framework was questioned but the majority view of the Court did not address the constitutional validity of the central holding of *Roe*.

³⁵ 18 *Pa. Cons. Stat. Ann.* §§ 3202–3220 (West 1983) (*Pennsylvania Abortion Control Act of 1982*). *NS. STAT.* (1990).

³⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992).

³⁷ Linda Hirshman, *Sisters in Law* (Kindle Locations 3586–88) (HarperCollins, Kindle ed. 2015).

³⁸ Christina B. Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 *Mich. L. Rev.* 1980, 1984 (2002).

with a phrase that “*liberty finds no refuge in a jurisprudence of doubt*” and was a response to the legislation that despite *Roe (supra)*, the legislature had enacted statutes that in effect created obstacles for women from exercising the right secured by *Roe (supra)*. However the equality argument formulated by Justice Ginsburg did not find place in the judgement. Therefore, the next milestone in development of abortion jurisprudence has to be the dissenting opinion of Justice Ginsburg in ***Gonzales, Attorney General v. Carhart et al***³⁹ that dealt with constitutional validity of the Partial-Birth Abortion Ban Act of 2003⁴⁰-federal statute regulating abortion procedures⁴¹. The statute was struck down by Eighth and Ninth Circuits Courts as unconstitutional due to its failure to include a health exception⁴². The majority opinion delivered by Justice Kennedy held that the statute was neither vague nor imposed undue burden on the women⁴³ and criminalizes an overt act separate from delivery that kills the fetus, with the requisite intent⁴⁴. The dissenting opinion by Justice Ginsburg and supported by Justices Stevens, Souter, and Breyer, criticised the majority's decision pointing out that it compromised women's health in favour of purported state interest⁴⁵. She did not mince words in pointing out that statutes must not only ensure that a woman's health is not compromised by compelling them to resort to less safe methods of abortion particularly when statute is most likely to affect younger and indigent women who may not be able to discover the pregnancy in the early stages or women carrying fetus with anomalies and health problems that cannot be diagnosed or developed until the second trimester⁴⁶ and held that State cannot to enforce its views “*on the whole society through operation of the criminal law*”⁴⁷.

In 2010, the Affordable Care Act was passed that mandated companies with more than fifty employees to provide affordable health coverage to all their employees, including access to

³⁹ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁴⁰ *Partial-Birth Abortion Ban Act of 2003*, 18 U.S.C. § 1531 (2000 ed. & Supp. IV 2004)

⁴¹ *Stenberg v. Carhart*, 530 U.S. 914(2000): *Supreme Court invalidated a Nebraska statute banning so-called “partial-birth abortions” on the grounds that it lacked a health exception and was impermissibly vague. The judgement emphasised that the State failed to show that the ban would avoid significant health risks and held medical authority in some cases indicated that the prohibited procedure was the safest available. The decision emphasised that abortion regulations must not endanger maternal health and that this principle bars the prohibition of both pre- and post-viability procedures where safer alternatives exist. The term “partial-birth abortion,” employed in the statute was not recognized within the medical profession, which instead refers to procedures such as dilation and evacuation (D&E). In response, Congress enacted the Partial-Birth Abortion Ban Act of 2003 (PBABA), largely mirroring the Nebraska law but providing more specific anatomical definitions. While the Act included an exception to save the life of the mother, it omitted a health exception, relying on congressional findings that the procedure was never medically necessary.*

⁴² Margo Kaplan, “A Special Class of Persons”: *Pregnant Women’s Right to Refuse Medical Treatment After Gonzales v. Carhart*, 13 U. Pa. J. Const. L. 145, 153 (2010).

⁴³ *Gonzales v. Carhart*, 550 U.S. 124, 141–47 (2007).

⁴⁴ *ibid.* at 142–44

⁴⁵ *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007).

⁴⁶ *Ibid* at 172-176

⁴⁷ *Ibid* at 176-183

contraception, or else pay a fee⁴⁸. The Hobby Lobby, a “*closely-held corporation*” challenged the law on the ground that they could not be forced to provide some forms of contraceptive coverage against their religious beliefs and sought an exemption under the Religious Freedom Restoration Act⁴⁹. In a majority opinion authored by Justice Alito, it was held that the Affordable Care Act violated the Religious Freedom Restoration Act of 1993 which was applicable to extended to closely held corporations⁵⁰. Justice Ginsburg in her dissent pointed out that the Religious Freedom Restoration Act should not be extended to corporations as the corporations ought not to be allowed to impose their religious beliefs on employees whereas the government does have a compelling interest in protecting women’s health through the contraceptive mandate⁵¹.

In 2013, Texas House Bill No. 2, widely known as HB 2 was passed by the second special session of the Eighty-third Texas Legislature⁵². The statute had two provisions pertaining to “*admitting-privileges requirement*,” and “*surgical-center requirement*,” that came to be challenged before the Supreme Court as unconstitutional⁵³. The state argued that the law provided necessary regulations for ensuring better health outcomes for the women. The opinion of the Court was pronounced by Justice Breyer and concluded that “*neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes*” and “*placed substantial obstacles in the path of women seeking a previability abortion*”⁵⁴. The provisions were held to violate the Federal Constitution⁵⁵ i.e. the Equal Protection Clause. Justice Ginsburg’s concurring opinion emphasizes that the statute intended to limit abortion which in modern times was a highly safe medical practice and would pose a

⁴⁸ Jared Ortaliza & Cynthia Cox, *The Affordable Care Act 101* (Kaiser Family Foundation, updated July 29, 2024), <https://www.kff.org/health-policy/101-the-affordable-care-act/?entry=table-of-contents-what-is-the-affordable-care-act>. On March 23, 2010, President Obama signed the Affordable Care Act (ACA). Earlier, high rates of uninsurance were prevalent due to unaffordability and exclusions based on preexisting conditions. The statute aimed at covering all aspects of the health system making changes to Medicare, Medicaid, and employer-sponsored coverage.

⁴⁹ *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (1993)

⁵⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730–31 (2014)

⁵¹ Corey Brettschneider, *Decisions and Dissents of Justice Ruth Bader Ginsburg: A Selection* (Penguin Liberty Book 1) 65–66 (Penguin Publ’g Grp., Kindle ed.).

⁵² *House Bill No. 2* (Eighty-third Texas Legislature), *Handbook of Texas* (Texas State Historical Ass’n), published online at <https://www.tshaonline.org/handbook/entries/house-bill-no-2-eighty-third-texas-legislature>.

⁵³ *Tex. Health & Safety Code Ann. §171.0031(a)* (West Cum. Supp. 2015): Texas statute providing that physicians performing abortions must have admitting privileges at local hospital.

Tex. Health & Safety Code Ann. §245.010(a): Texas statute providing that abortion facilities must meet minimum standards for surgical centers.

⁵⁴ *Whole Woman’s Health v. Hellerstedt*, 2016 SCC OnLine US SC 68 : 579 U.S. 582 (2016).

⁵⁵ Federal Constitution. Amdt. 14, §1 **Rights**: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

significantly greater risk to patients than abortions and do not require ambulatory-surgical-center or hospital admitting privileges⁵⁶. The jurisprudence developed so far, however, was to detrimentally change on June 24, 2022 when the court would decide constitutional validity of Mississippi's Gestational Age Act⁵⁷ that prohibited most abortion procedures after the initial 15 weeks of gestation came for consideration before the Supreme Court⁵⁸. The Supreme Court overturned *Roe* (*supra*) and *Planned Parenthood* (*supra*) holding that the right to abortion was not a right "mentioned" in the constitution. The Court found historical analysis in *Roe* (*supra*) as flawed holding that it lacked justifications for permitting pre-viability abortions, without explaining why viability was decisive⁵⁹. The Court held abortion rights were neither "deeply rooted in this Nation's history and tradition" nor implicit in the concept of ordered liberty under the Fourteenth Amendment⁶⁰. The decision called *Roe* (*supra*) an "abuse of judicial authority," and *Planned Parenthood's* (*supra*) undue burden standard unworkable and concluded that abortion regulation must be left to the democratic process, reaffirming that "direct control of medical practice in the States is beyond the power of the federal government"⁶¹. Thus the right that the Supreme Court saw flowing from the constitution became invisible suddenly.

India

The oldest statutory law on abortion still enforceable in India was originally codified under the Indian Penal Code 1890⁶²- the common criminal law. Today the enactment stands replaced by Bharatiya Nyaya Sanhita, 2023⁶³. However the provisions relating to abortion are retained verbatim, along with the illustration given under the old law. Thus even though the Bharatiya Nyaya Sanhita was enacted in 2023 it retains the morality of the English law of 1860⁶⁴. When the Indian Penal Code was enacted in 1860 on the basis of the recommendations of the First Law Commission of India chaired by Thomas Babington Macaulay, there was no law in India to deal with problems faced by women on account of criminalisation of abortion or constitutional remedy guaranteed to its citizens to seek enforcement of fundamental rights guaranteed as they are guaranteed under the Constitution of India. However by the year 2023, the Indian Supreme Court had recognised the freedom to make reproductive decisions as right to life guaranteed under Article 21 of the Constitution

⁵⁶ Corey Brettschneider, *Decisions and Dissents of Justice Ruth Bader Ginsburg: A Selection* (Penguin Liberty Book 1) (Penguin Publ'g Grp. 2020) (Kindle ed.), at 78–80.

⁵⁷ *Miss. Code Ann. § 41-41-191* (2024) (*Gestational Age Act*).

⁵⁸ *Dobbs v. Jackson Women's Health Organization*, 2022 SCC OnLine US SC 9 : 597 U.S. ____ (2022)

⁵⁹ *Roe v. Wade*, 410 U.S. 113, 132–52 (1973).

⁶⁰ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 227 (2022) at 235 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁶¹ *Ibid.* at 228 (quoting *Linder v. United States*, 268 U.S. 5, 18 (1925)).

⁶² See § 312-318: *The Indian Penal Code*, No. 45 of 1860,

⁶³ See § 88–94. *Bharatiya Nyaya Sanhita* § 88 (India, 2023)

⁶⁴ *In the United Kingdom*, abortion was criminalized under sections 58 and 59 of the *Offences Against the Person Act, 1861*, which subjected both the mother and the abortionist to punishment, except where the life of the mother was at risk. *Offences Against the Person Act, 1861*, 24 & 25 Vict. c. 100, §§ 58–59 (U.K.)

of India and the Parliament had enacted the Medical Termination of Pregnancy Act, 1971⁶⁵ to regulate the law on abortion particularly in view of the problems faced by women in view of the provisions of Indian Penal Code. A commission headed by Shri Shantilal Shah was constituted on 29.09.1964 by the Central Family Planning Board, Ministry of Health to examine the issue of legalization of abortion and recommended the expansion of the law while authorising that only qualified medical practitioners could perform the procedure in places recognised by the government⁶⁶. Interestingly the Committee was of the view that liberalising the abortion law would help promote family planning. The Medical Termination of Pregnancy Act 1971 (subsequently amended, most recently in 2021) was enacted primarily based on the recommendations of the Shah Committee, permitting a registered medical practitioner to terminate a pregnancy up to twenty weeks. For pregnancies between twenty and twenty-four weeks, termination was permissible if at least two practitioners, acting in good faith, believed that the continuation of the pregnancy would endanger the woman's life or cause grave injury to her physical or mental health, or that the child would likely suffer serious physical or mental abnormalities. Mental anguish resulting from a pregnancy caused by contraceptive failure or alleged rape was presumed to constitute grave injury to the woman's mental health. In assessing health risks, the woman's actual or foreseeable environment shall be considered. However, pregnancy of a minor or a mentally ill woman could not be terminated without the guardian's written consent⁶⁷. The newly enacted Bharatiya Nayay Sahita failed to even take in account the provisions of Medical Termination of Pregnancy Act, 1971 or the fundamental rights guaranteed under the Constitution. The new criminal law could have been an opportunity to develop jurisprudence in line with judicial pronouncements and change in state of medical and health facilities since 1860. Unfortunately, the opportunity was clearly missed.

Pertinently, the statutory scheme of Medical Termination of Pregnancy Act, 1971 bears a significant resemblance to the trimester framework articulated in *Roe (supra)*⁶⁸ by the Supreme Court of the United States around the same period. Unlike the United States, where the trimester framework of *Roe (supra)*⁶⁹ with “undue burden standard” by the decisions in *Planned Parenthood (supra)*⁷⁰, the Medical Termination of Pregnancy Act enumerates circumstances that can be classified as “undue burden”. The judicial pronouncements by the Supreme Court of India has successfully extended the benefit of the statute to unmarried women⁷¹ holding the scope of Rule 3-B of the Medical Termination of Pregnancy Rules,

⁶⁵ *Statement of Objects and Reasons, "Medical Termination of Pregnancy Act, 1971, Act No. 34 of 1971, Gazette of India, Extraordinary, Pt. II, Sec. 2, Nov. 17, 1969, at 880.*

⁶⁶ *Shah, Shantilal H., Report of the Committee to Study the Question of Legalisation of Abortion 51–54 (1966), <https://archive.org/details/dli.csl.1212/page/n9/mode/2up>.*

⁶⁷ Medical Termination of Pregnancy Act, No. 34, §§ 3–4, 1971 (India)

⁶⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁹ *Ibid*

⁷⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁷¹ *X2 v. State (NCT of Delhi)*, (2023) 9 SCC 433 (India): *Petitioner was an unmarried woman carrying a single intrauterine pregnancy of 22 weeks, which resulted from a consensual relationship with a partner who had refused marriage. She contended that continuation of the pregnancy would cause grave injury to her mental health, compounded by the absence of a livelihood and potential social stigma. However the High Court restricted notice to only her claim seeking amendment of Rule 3-B to include unmarried women and rejected*

2003⁷² (as amended on 21-10-2021) under Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 ought to include unmarried women holding that a narrow interpretation would be discriminatory towards unmarried women and violative of Article 14 of the Constitution⁷³. The decision notes India's commitment to international treaties and conventions on reproductive *rights but cautioned* that nothing in this judgment was to be construed as diluting the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994⁷⁴. This is because female foeticide is not a myth in India. The sex ratio at birth identified nationally is 929 females per 1,000 males for 2019-21⁷⁵. Several incidents continue to get reported on organised rackets involving female foeticide⁷⁶. Consequently, while permitting termination of pregnancy, the Supreme Court do examine the plea in the backdrop of female infanticide. When a married woman with two sons had filed a petition seeking termination of a third semester pregnancy on the ground that since "*she had adopted LAM4 which implies absence of menstruation due to continuing breast feeding as a contraceptive method after delivery of the second child*", the Supreme Court (bench comprising Justice Hima Kohli and Justice B V Nagarathana) allowed the petition recognising "*reproductive autonomy*" of a woman but before allowing the petition, the Court also examined the request against the patriarchal mindset of Indian society and the permission was granted only after the Court was satisfied on that aspect⁷⁷. Pursuant to

her criminal miscellaneous application for interim relief for termination of pregnancy before the completion of twenty-four weeks.

⁷² Med. Termination of Pregnancy Rules, r. 3-B (India), as amended Oct. 21, 2021, under Med. Termination of Pregnancy Act, No. 34, § 3(2)(b), Acts of Parliament, 1971 (India)

⁷³ Ibid pg. 498

⁷⁴ The law prohibits sex selection, before or after conception and permits use of prenatal diagnostic techniques only for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders. The law is aimed at prevention of female foeticide.

⁷⁵ National Family Health Survey (NFHS-5) <https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf>

⁷⁶ Pati, I. (2025, July 23). "824 late abortions under scrutiny, 19 FIRs for suspected female foeticide." *The Times of India*. <https://timesofindia.indiatimes.com/city/gurgaon/824-late-abortion-under-scrutiny-19-firs-for-suspected-female-foeticide/articleshow/122854527.cms> TNN. (2024, June 14). "Sex Determination Racket: Sex Determination Racket Busted in Gurgaon and Jhajjar; 2 Arrested." *The Times of India*. <https://timesofindia.indiatimes.com/city/gurgaon/sex-determination-racket-busted-in-gurgaon-and-jhajjar-2-arrested/articleshow/110979242.cms> <https://www.indiatoday.in/india/story/karnataka-doctor-arrested-performing-900-illegal-abortion-sex-determination-female-foeticide-2468225-2023-11-27> <https://www.hindustantimes.com/india-news/mysuru-nurse-arrested-by-cid-in-female-foeticide-racket-case-101701718387418.html> PTI. (2023, December 1). "Foeticide ring busted in Bengaluru, 9 arrested." *The Indian Express*. <https://indianexpress.com/article/cities/bangalore/female-foeticide-case-karnataka-police-arrest-owner-of-hospital-near-bengaluru-9072759/> <https://www.ndtv.com/karnataka-news/woman-dies-during-illegal-abortion-attempt-parents-arrested-in-karnataka-5793086> <https://medicaldialogues.in/news/health/female-foeticide-racket-busted-at-guesthouse-radiologist-charged-rs-15000-paid-nurse-rs-7000-149446> Bijapur, N. (2024, May 29). "Maharashtra woman dies during illegal abortion, family caught carrying body to conceal crime." *The New Indian Express*. <https://www.newindianexpress.com/nation/2024/May/29/maharashtra-woman-dies-during-illegal-abortion-family-caught-carrying-body-to-conceal-crime> SCC Online. (2024, September 18). "Chairman or any other Member acting alone, cannot authorise Search under Section 30(1) of PNDT Act: Supreme Court." SCC Online Blog. <https://www.sconline.com/blog/post/2024/09/18/chairman-member-acting-alone-cannot-authorise-search-s-301-pndtact-sc-legal-news/#:~:text=If%20a%20single%20member%20of,done%20in%20that%20manner%20only%E2%80%9D>

⁷⁷ Ibid para 20

the above order, a doctor from the medical board emailed stating that the “*foetus had a strong chance of survival*” and sought directions from the Court as to whether the foetal heartbeat ought to be stopped. However this time, the judges were unable to agree and had a split verdict. While Justice Hima Kohli, held that her *judicial conscience prevented her from allowing the prayer*, Justice B V Nagarathna held that the order permitting termination ought not to be overturned as interest of the mother ought to be given preference and *her decision ought to be respected and must not be substituted by the decision of Court*. She also underscored that *a foetus is dependent on the mother and cannot be recognized as a personality apart from that of the mother as its very existence is owed to the mother*⁷⁸. In view of the split verdict, the matter was placed before a three judge Bench which refused medical termination of the pregnancy on the ground that having crossed the statutory limit of twenty-four weeks and in the absence “*substantial foetal abnormalities*” or necessity to save the life of the mother⁷⁹. Thus Supreme Court⁸⁰ confined itself to the contours of the statutory scheme without dealing with the issue of decisional autonomy and independent identity of the fetus even after recognising the right of a woman to make reproductive choices without undue interference from the state⁸¹ or guardian⁸². Thus there continues a jurisprudential vacuum on the scope of State’s intervention and burden it imposes on the pregnant woman.

Conclusion

The constitutions in both the countries guarantee equality to its citizens and in both jurisdictions the state has an interest in fetal life. Since pregnancy is a condition peculiar to females, the limitations imposed by state impact females in ways it does not impact men. The constitutional principles of equality demands that the uniqueness must not result in disability for a woman depriving her of bodily autonomy. In United States, after *Dobbs*⁸³ feminist jurisprudence has received severe set back⁸⁴. While one can argue that post *Dobbs* (*supra*)⁸⁵, abortion jurisprudence in India is more liberal in comparison to the United States but issues that have been deliberated systematically in the Supreme Court of the United States are yet to be debated in India. The ability to enjoy reproductive rights depends social, economic, and physical conditions of a woman⁸⁶. Emancipation of women premandates

⁷⁸ XYZ v. Union of India, (2023) 19 SCC 524

⁷⁹ X v. Union of India, 2023 SCC OnLine SC 1338

⁸⁰ X v. Union of India, 2023 SCC OnLine SC 1338

⁸¹ XYZ v. State of Gujarat, 2023 SCC OnLine SC 1573

⁸² A (Mother of X) v. State of Maharashtra and another, 2024 INSC 371

⁸³ Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 227 (2022) at 235 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

⁸⁴ Stephen E. Sachs, *Dobbs and the Originalists*, 48 Harv. J.L. & Pub. Pol’y (2025), available at <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2025/01/3-Sachs.pdf>.

⁸⁵ Dobbs v. Jackson Women’s Health Organization, 2022 SCC OnLine US SC 9 : 597 U.S. ____ (2022)

⁸⁶ Dipika Jain & Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India*, 39 Colum. J. Gender & L. 1, 2 (2020), available at https://scholarship.law.columbia.edu/human_rights_institute/7.

opening public spheres for women without limiting them in childbearing roles. In this backdrop, when a woman approaches Court seeking termination of pregnancy, the approach of the court to evaluate the request with suspicion of female infanticide is not erroneous. However, in cases where the request is made voluntarily and without coercion or undue influence, any further interference by the State insisting continuation of pregnancy constitutes an undue burden on the women. Legal frameworks on abortion reflect a negotiation between state interests in potential life, public morality, and medical ethics on one side, and women's autonomy, dignity, and integrity on the other. The State's right to intervene must correspond with duty to provide. In the absence of free healthcare, education and child support facilities, the right of the State to intervene cannot be justified. The questions the courts ought to answer is whether the State has the moral right to insist on the birth of a child they cannot adequately provide for. The State's interest to safeguard maternal and child health can be effectively guarded by ensuring that women's decisions are informed, voluntary, and supported by access to quality healthcare. Furthermore, pregnancy and childcare, in absence of a support system by the State creates an impediment that forecloses the right of women to opportunities available to men. The State's interest can be justified only if it is willing to frame laws and policies to prevent discrimination on account of this special condition instead of the trimester scheme. However, insisting on continuation of pregnancy, fostering stereotypical assumptions of motherhood while foreclosing the opportunities for women is neither just nor fair. It is in these circumstances, that women such as Fire Shulamith imagined a world without natural pregnancy.