CHANGING LANDSCAPE OF ABORTION LAWS: A COMPARATIVE ANALYSIS OF REPRODUCTIVE JUSTICE IN UNITED STATES AND INDIA

Preeti Saxena [*]
Adesh Kumar[**]
Dhairya Jaiswal[***]

Abstract

In 1972, the Supreme Court of the United States in the landmark case of *Jane Roe* v. *Henry Wade* held that the right to abortion is a fundamental right of women while the Medical Termination of Pregnancy Act was enacted in India in 1971 which allowed abortion only in case a medical emergency arises. Recently, the Supreme Court of the United States in the case of Dobbs, *State Health Officer of the Mississippi Department of Health* v. *Jackson Women's Health Organization* held that the abortion right is not a fundamental right of women while the Indian apex court in the case of *X* v. *Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi* held that all women in this country can undergo an abortion up to 24 weeks of pregnancy even though she is not married. Hence there is a diverse change in the laws of abortion in both countries. However, the Indian Judiciary has taken a more progressive view in recognising the right to abortion based on the right to reproductive autonomy, privacy of women and right to dignity. The present paper has discussed the ideological differences on abortion between both the nations under comparison on their legal framework, judicial interpretation and the rights of women and unborn child under the international human rights regime.

I Introduction

ALL HUMAN beings in this world are born equal and free. Freedom is an essential aspect of the life of any person. Women are also not the exception to it. They also enjoy the freedom of their life, which also includes their mind, body and soul also. A woman has the freedom to live her life freely without any barriers. But whether this freedom includes the option of aborting a child in the womb or not has been a question for a long time. Abortion has been an issue of controversy hitherto at national as well as international levels. It has always faced challenges due to the ideals enshrined in mythology and has been constantly scrutinized by moral principles because the right to abortion is often seen as conflicting with the right to life of the unborn child.

There is no a single definition of abortion. As per the definition of Encyclopaedia Britannica,[1]

> An abortion is the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation).

* Vice Chancellor, Himachal Pradesh Law University, Shimla.

** Professor and Co-ordinator, Deptt. of Law, University of Allahabad, Prayagraj.

*** Research Scholar, Faculty of Law, Banaras Hindu Unuversity, Baranasi.

1 *Abortion*, Britannica Dictionary, (Apr. 6, 2023), *available at:* https://www.britannica.com/science/abortion-pregnancy (last visited on May 20, 2025).

The Cambridge Dictionary defines,

> Abortion as the early, unintentional ending of a pregnancy when a baby or young animal is born too early and dies before it is fully developed. Hence abortion is the termination of pregnancy.

As per the Britannica dictionary, abortion may be of two kinds- *firstly* spontaneous abortion, *and secondly,* induced abortion. Spontaneous abortion is a kind of termination of pregnancy that takes place due to diseases, trauma, health issues, genetic disorders, etc. In this termination of pregnancy, there is no intentional human intervention. Induced abortion is a medical termination of pregnancy to do so. It may be performed due to many causes as to protect the health of a woman, to prevent the birth of a child with an abnormality, or to prevent a pregnancy that occurred due to rape of a woman, *etc.* The law of abortion is needed when there is an induced abortion because the induced abortion intentionally ends the life of a child conceived.

II Ideological differences on abortion

Pro-life versus pro-choice

The abortion debate presents a conflict between morality and law. Abortion has traditionally been viewed as morally wrong, as it involves ending the life of an unborn child in the womb. However, legal frameworks prioritize women's rights to liberty, health preservation, and privacy, forming the basis for abortion laws. Hence, two philosophical thoughts form the basis of this debate, namely, pro-choice versus pro-life. The pro-life theory is against the abortion of the fetus. This theory considers that life begins at conception of a fetus and therefore a fetus is a human being that cannot be aborted before birth. This theory advocates for fetal rights.[2] The argument is that the fetus is an innocent person and it is morally wrong to end the life of an innocent person.

The debate always centered on the premise that Is the fetus a person? If it is a person, then it also has the rights that belong to persons.[3] Hence an unborn child has the right to life as born persons have. However, the renowned philosopher Judith Jarvis Thomson opined that abortion may be morally justified even if the fetus is a person. She justified it with the violinist example. Imagine you're unconscious and unknowingly connected to a famous violinist who must depend upon you for life support. Philosopher Judith Thomson argues you would be morally right to disconnect, even though the violinist would die. This is similar to a woman's right to have an abortion. Just like you shouldn't be forced to be a life-support machine, a woman shouldn't be forced to carry a pregnancy to term. A pregnant woman is allowed to unhook herself from the fetus conceived, even if it results in the death of the fetus and even if the fetus is a person[4]. Though Thomson's analogy has some limitations it

2 Anushka Kumari*, Abortion Laws in India*, 1 *Burnished Law Journal* (2020).

3 Steven Schwartz, *The Moral Question of Abortion* (Loyola University Press, 1990).

4 Judith Jarvis Thomson, *Abortion*, XX No. 3 *The Boston Review*, (Jan 1994/Dec 1995).

covers the cases of rape only. The philosopher Jane English refined the violinist example and opined that if you go out at night and you know that you might be rendered unconscious and hooked up to the violinist. You would still be entitled to unhook yourself. This is the basis of conventional cases of unwanted pregnancies.[5]

According to Vaknin: [6]

> When a woman engages in voluntary sex, doesn't use contraceptives and gets pregnant-one can say that she signed a contract with her fetus.

Burkhardt and Nathaniel also opined that: [7]

> The woman has the right to decide for herself and her body. The fetus is part of the mother's body and every human being holds the right to decide for themselves. Mother has a right to decide on behalf of the fetus but it should be for the best interest of the fetus.

India's approach to abortion differs from many countries. Unlike nations with pro-life stances that completely outlaw pregnancy termination, India's Medical Termination of Pregnancy Act reflects a pro-choice viewpoint. This legislation prioritizes the health and safety of the mother. In situations where a pregnancy poses a threat to the woman's life, the law allows termination at any stage up to 20 weeks, and the qualified medical professional can authorize the procedure based on their assessment. However, beyond 20 weeks, a medical board has to be set up, but if we need to save the life of a woman, then the medical board can be bypassed.[8]

However, the moral convictions of those who fail to acknowledge the rights of women in such circumstances do not form the basis of the law. This would undoubtedly be a step backwards in the fight for gender equity and the empowerment of women if, only moral considerations had been taken into account. With the changing notions of morality, the law is also evolving, the impact of which is seen throughout the world. India and the United States have also undergone a significant shift in their abortion laws.

Due process: be a source of abortion rights or not

The Constitution of the United States does not provide any specific right to abortion to women though the various courts have opined that the right to abortion emanates from the Constitution of America. In protecting the right to abortion, the apex court held the birth control law of Connecticut is unconstitutional, though the court

5 George McKenna, *On Abortion: A Lincolnian Position*, 276(3) *The Atlantic Monthly*, 1995.

6 Shirin Badruddin, "Abortion and Ethics", *Journal of Clinical Research and Bioethics*, Doi: 10.4172/2155-9627.1000291.

7 *Ibid.*

8 *Poonam Sharma* v. *Union of India* [MA 2157/2023 in W.P.(C) No. 1137/2023] (Oct. 25, 2023), *available at:* https://www.verdictum.in/court-updates/supreme-court/are-these-prescriptions-to-be-believed-by-the-supreme-court-or-are-they-brought-up-for-the-purpose-of-moving-to-us-1499338?infinitescroll=1).

vehemently refrained itself to have reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision and opined that personal marital and familial including sexual privacy to be protected by the Bill of Rights or its penumbras[9]. In *Jane Roe* v. *Henry Wade*, the Supreme Court of the United States upheld that: [10]

> The Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution but the decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the 'Due Process' clause of the fourteenth amendment.

In a Constitution for a free people, there is no doubt that the meaning of 'liberty' of the individual must be broad indeed.[11] While the Constitution doesn't directly mention a right to make personal decisions about marriage and family, the Fourteenth Amendment's Due Process Clause offers broader protection than just the freedoms listed in the Bill of Rights. This clause safeguards a concept of "liberty" that includes rights beyond those explicitly spelled out.[12] John Marshall Harlan, Justice, Supreme Court of America once stated that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."[13] Again, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey, Governor of Pennsylvania*[14] the Supreme Court held that the abortion right is an aspect of the "liberty" protected by the 'Due Process' clause of the Fourteenth Amendment. But in 2022, the Supreme Court of America overruled the leading cases *Roe* v. *Wade* and *Planned Parenthood* v. *Casey* and held that:[15]

> The Constitution does not refer to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely-the Due Process Clause of the Fourteenth Amendment.

Justices Stephen Breyer, Elana Kagan, and Sonia Sotomayor in their dissenting opinion raised concern that "*the ruling indeed also "places in jeopardy other rights, from contraception to*

---

9 *Griswold* v. *Connecticut* 381 U.S. 479.

10 *Jane Roe* v. *Henry Wade*, 410 U.S. 113 (1973).

11 *Board of Regents* v. *Roth*, 408 U.S. 564.

12 *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Loving* v. *Virginia,* 388 U.S. 1; *Griswold* v. *Connecticut,* 381 U.S. 479; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Meyer* v. *Nebraska,* 262 U.S. 390; *Prince* v. *Massachusetts,* 321 U.S. 158.

13 *Supra* note 13.

14 505 U.S. 833 (1992).

15 Dobbs, *State Health Officer of the Mississippi Department of Health* v. *Jackson Women's Health Organization* No. 19-1392, 597 U.S. (2022).

same-sex intimacy and marriage."[16] On the question, of whether the decision extends beyond the Roe overruling, Justice Alito explicitly said *"we have stated unequivocally that nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion*." Justice Clarence Thomas, Supreme Court of America agreed with the opinion of the court held that: [17]

> Because the court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely but in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.

The approach of the American Supreme Court on the issue of due process reminded the decision of the Indian Supreme Court given in 1950, just after the adoption of the Constitution of India 1950, on the issue of 'personal liberty' guaranteed under Article 21 of the Constitution of India.[18] The apex court of India interpreted that the term 'procedure established by law' used under Article 21 of the Constitution of India is restricted only to procedural due process though Justice Fazl Ali, in his dissenting opinion, expressed that:

> The fundamental rights do not contemplate that each article is a code by itself and is independent of the others. It cannot be said that articles 19, 20, 21, and 22 do not to some extent overlap each other.

The majority judgment of *Gopalan* was overruled by the Supreme Court in *Maneka Gandhi* v. *Union of India,*[19] and held that the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' to confine. The leading case *K S Puttaswamy* v. *Union of India*[20] also deals with the facets of the right to abortion. Justice Chelameshwar held that a "*woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy*." This court recognized the right to bodily integrity as an important facet of the right to privacy. The court relied upon *Suchita Srivastava* v. *Chandigarh Administration*[21] and in recognizing the reproductive autonomy, reiterated that "*the statutory right of a woman to undergo termination of pregnancy under the MTP Act is relatable to the constitutional*

16 Upendra Baxi, *More Than A Requiem for Reproductive Freedom?* (Oct. 27, 2023), *available at:* https://www.indialegallive.com/column-news/more-than-a-requiem-for-reproductive-freedom-roe-vs-wade/ (last visited on May 20, 2025).

17 *Supra* note 18.

18 *A. K. Gopalan* v. *State of Madras* [1950] SCR 88.

19 1978 AIR 597 (India).

20 (2017) 10 SCC 1 (India).

21 (2009) 9 SCC 1 (India).

right to make reproductive choices under Article 21 of the Constitution." In 2022, The Supreme Court of India held that "*Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake'*[22] though the court denied the right to abortion in a case where the woman is 26 weeks pregnant and there is no immediate threat to the mother, and that it was not a case of fetal abnormality. The court passed the order[23] on the Union of India's petition filed for recall of an earlier order of the court in which termination of pregnancy was allowed but AIIMS doctor, after medical examination, sent an email to the government of India which stated that the fetus is viable and asked for a direction specifically permitting the stopping of the fetal heart, hence the Supreme Court rejected the plea of the women to abort the child.[24]

III International instruments for protection of right to abortion

Universal Declaration of Human Rights 1948

The *Universal Declaration of Human Rights* 1948 (UDHR) is the first international document that recognized human rights at the international level. It is the manifesto of the protection of human rights of human beings. The declaration does not express the right to abortion explicitly. The declaration provides that "*all human beings are born free and equal in dignity and rights*"[25] and "*everyone has the right to life, liberty, and security of person.*[26] The declaration affirms that all human beings have inherited the human rights of equality, freedom, and the right to life. This right to life is the foundation of all other human rights. The declaration also protects the right to health of every person. It ensures that "*everyone has the right to a standard of living adequate for the health and well-being of himself.*"[27] The woman also has these rights and she cannot be discriminated against based on gender.[28] The UDHR does not make it clear whether the right to abortion is a human right. At one place right to life is granted to all human beings and the term 'human beings' includes the unborn child also because the term 'person' is not used in the text of UDHR. As per the judicial interpretations of the

22 *X* v. *The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi* (India).

23 *X* v. *Union of India* 2023 INSC 919Live Law (SC) 840 (1ndia).

24 Padma Bhate-Deosthali and Sangeeta Rege, Judges and Doctors, Listen" *The Times of India*, Oct 27, 2023. The authors opined that the Medical Health Care Law 2017 adopts a right-based approach and this law is violated when the adult woman is denied abortion rights. The doctors and court must consider the scientific evidence. The medical boards and courts must also take into account the social, economic, psychological, and physical consequences of continuing unwanted pregnancy.

25 UDHR 1948. art. 1.

26 *Id.*, art. 3.

27 *Id.*, art. 25.

28 *Id.*, art. 2 says that everyone is entitled to all the rights and freedoms outlined in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

term 'person' in the United States and the common law system, the unborn child is not included in it. Hence it can be said that the right to abortion cannot be considered as a human right under the UDHR. But at the same time, every woman has been granted the right to enjoy the liberty of her life. She is the only person in this world who has control over her body and mind. Thus, the woman can claim the right to abortion as a human right because she has the right to enjoy and protect her life and health as per the mandate of the UDHR.

International Covenant on Civil and Political Rights 1966

In pursuance of the UDHR, the United Nations adopted the *International Covenant on Civil and Political Rights 1966* (ICCPR) to enforce the mandate of the UDHR. This covenant protects the right to life is a fundamental human right of every human being. The covenant provides that "*every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"[29] The covenant confers this right without any discrimination based on gender. The right to life is available to women also. This covenant is in accordance with the UDHR hence it does not make it clear that the right to abortion is a matter of human rights for women. The United Nations Human Rights Committee has remarked that "*in terms of Article 6, State Parties have the responsibility to provide safe, legal, and effective access to abortion.*"[30]

International Covenant on Economic, Social and Cultural Rights 1966

The United Nations adopted the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) for the protection of economic, social and cultural rights. India is also a signatory of to ICESCR, which discusses the right to mental and physical health in detail. The covenant provides that "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[31] The *Human Rights Committee on Economic, Social and Cultural Rights* discussed the issue of reproductive rights and commented that the right to sexual and reproductive health is an integral part of the right to the highest attainable physical and mental health.[32]

United Nations Convention on the Rights of Child 1989

The *United Nations Convention on the Rights of Child 1989* (UNCRC) is the first international document in which the issue of abortion is discussed at large. This convention was adopted by the United Nations for the protection of the rights of children. At the time of the drafting of UNCRC, the right to life of the child before

29 ICCPR 1966. art. 6.

30 *Supra* note 25 at 69.

31 ICESCR 1966. art. 12.

32 *Supra* note 25 at 70.

birth and the right to abortion of women came into conflict between developed and developing countries. The developing countries i.e., the countries with strict abortion laws advocated for pre-natal rights i.e., the right to life of the child before birth while developed countries i.e., countries liberal with abortion laws were interested in protecting the right to abortion of women. The right to abortion and the right to life could not be protected simultaneously. The controversy was resolved through the travaux preparatoires (official records) in which it was negotiated that the member countries could decide the minimum age of a child through their domestic legislation. The convention defined childhood only in terms of the upper age limit.[33] The convention protects the right to life of children, but the convention provides that it should not be interpreted to refer to an unborn child.[34]

IV Statutory provisions for regulation of right to abortion

The development of the right to life, health, and privacy of women led to the development of the right to abortion in the United States and India. The right to abortion has been guaranteed to women through statutory provisions and protected through judicial pronouncements in both the countries. However, there is a fundamental difference in law between both the countries.

The Statutory laws on abortion in the United States: Evolution and the shift in the Catholic Church era

In the United States, abortion is not recognized by the Catholic Church; it is considered to be a sin. The Church has constantly supported the unborn child's right to life. There is a persistent message that direct abortion is immoral and that life should be protected from the moment of conception. An early Christian writer Tertullian opined that the law of Mosses provides strict penalties for abortion.

"If men who are fighting hit a pregnant woman and she gives birth prematurely [Hebrew: "so that her child comes out"], but there is no serious injury, the offender must be fined whatever the woman's husband demands and the court allows. But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot".[35] Pope XII opined that every human being, even the child in its mother's womb, receives its right to life directly from God, not from its parents, nor any human society or authority."[36] For a considerable period, the Church's stand served as an obstacle to the legalization of abortion.

---

33 UNCRC 1989. art. 1 says that for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, the majority is attained earlier.

34 *Id.*, art. 6.

35 Bible. New International Version, Bible Gateway, (NIV) [2023]. (Apr 07, 2023), *available at:* https://www.biblegateway.com/passage/?search=Exodus%2021%3A22-24&version=NIV.

36 Frank J. Ayd, Jr. "Abortion: The Catholic Viewpoint", In R. Bruce Sloane, *"Abortion Changing Views And Practice"*, (Grune And Stratton, 1970).

Statutory provisions held abortion illegal

The state of Massachusetts enforced the first legislation making abortion or attempted abortion at any stage of pregnancy illegal. Nearly all governments of different states had adopted this policy in that era. Only the state of Pennsylvania allowed all types of abortions but the rest of the states permitted the abortion when the woman's life would be in danger. The state of Mississippi allowed the abortions in cases of rape or life endangerment. The Colorado, Massachusetts, Alabama, New Mexico, and the District of Columbia permitted abortions if the woman's life or bodily health was in danger.[37]

American Law Institute (ALI) Code on Abortion

In 1930-40 the development took place in the treatment of obstetrics and gynaecology. Abortion was considered as a way to save a woman's life. Some doctors raised their voices for reforms. In 1959, a draft proposal to legalize abortion in instances of fetal abnormality, rape, incest, or when the woman's health was in danger was published in the American Law Institute (hereinafter to be referred as ALI). This proposal challenged the moral code of the Church. The ALI wanted a discussion on abortion to pave the way for a codified law on the same. The ALI draft contained the following salient measures:

(i) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another, otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(ii) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with a grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for this Subsection. Justifiable abortions shall be performed only in a licensed hospital except in cases of emergency when hospital facilities are unavailable.

(iii) Physicians' Certificates: Presumption from Non-Compliance. Strict regulations govern abortion procedures. In all cases, written approval from two doctors is mandatory. One doctor can be the one performing the abortion itself. This written certification must detail the reasons why the doctors believe the abortion is justified. Additionally, the certificate needs to be submitted beforehand – to the hospital where the procedure will take place. However, in situations where

37 Rachel Benson Gold, *Abortion And Women's Health: A Turning Point For American* (Alan Guttmacher Institute, New York 1990).

> the pregnancy is believed to be the result of a crime, the document must also be submitted to law enforcement officials or the prosecutor. Any failure to adhere to these requirements creates a legal presumption that the abortion was not justified.[38]

Statutory provisions held abortion legal

This was also the time when feminist movements, demanding the outright repealing of the abortion laws, came to the forefront. The ALI model was welcomed by various states of the United States, which drafted their laws on abortion based on the ALI model and enforced them. The very first reform was implemented by the state of Colorado based on the ALI recommendations. The Colorado statute on permitted abortions in case of certain conditions, first if it is found that the pregnant woman's life, physical or mental health, was endangered, second if it is found that the fetus would be born with a severe physical or mental medical defect, third if it is found that the pregnancy had resulted from rape or incest. Other states then began to follow. These reforms based on the ALI model also took place in North Carolina, California, and Georgia in 1967, Georgia and Maryland in 1968, and Arkansas, Kansas, Delaware, Oregon, and New Mexico in 1969. The Model Penal Code for abortion drafted by the American Law Institute, had generally modified the laws of various states to allow a medical, psychiatric, fatal, and humanitarian indication but there were some changes in the laws of different states in the United States. All but five states had introduced abortion reform legislation by 1973, the year the Supreme Court issued its ruling in Roe.[39] In 1965, another development took place which strengthened the movement of advocacy for the protection of the right to abortion. The Supreme Court of the United States in the case of *Griswold* v. *Connecticut*[40] struck down the Connecticut law that prohibited married couples from using contraceptives. The court held that the prohibition of using contraceptive pills is a violation of the right to privacy. The Bill of Rights of the United States protects the right to privacy and the Connecticut law about contraceptive pills violates the right to marital privacy. Through these constitutional interpretations, the way for the protection of the right to abortion was paved in the United States.

Legal framework on abortion in India

Vedic era

In Indian mythology, the philosophical discussions on abortion are governed by the ancient scripts Vedas and Smritis. These manuscripts express the doctrines of Ahimsa,

---

38 *Ibid.*

39 Lessons from Before Roe: Will Past be Prologue? By Rachel Benson, Gold, (Apr. 7, 2023)https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue#box.

40 381 U.S. 479 (1965).

Karma, rebirth, and the overarching ideal of Dharma or the universal truth. The earliest mention of abortion is perhaps found in the Atharvaveda, which says that the "embryo-slayer is the biggest sinner.[41] The Rigveda explains the several stages of pregnancy and the rituals to be performed.[42] These are Garbhadhan (at the time of conception), Pumsavana (at the end of the first trimester), Garbharakshana (in the fourth month), and Jatakarma (at the time of delivery). These rituals are performed to personify the unborn child and emphasize that special care is required for the human fetus/embryo which starts from the very conception. The *Manusmriti,* which is considered the source of law in ancient India prescribes punishment for the abortion of a child.[43] Thus, it can be said that, like in the United States, in India, abortion was regarded as a sin in ancient manuscripts. There is no difference between the notions of morality in the ancient world as seen through the religious and cultural spectrum of both countries.

Strict statutory law on abortion

From the legal point of view, Abortion laws in India have evolved through historical court rulings and parliamentary legislation. The first criminal law was enforced by Britishers in 1860 which provided abortion of an unborn child as a criminal act. It was based on the Victorian notion of morality. It provides that whosoever shall cause the abortion of the unborn child, shall be punished.[44]

Liberal statutory law on abortion

In 1960, the Government of India appointed a committee under the chairmanship of renowned medical professional Shantilal Shah. The committee considered every aspect related to abortion, *i.e.*, statistical data, cultural and moral aspects, and after long deliberations submitted its report in 1966.[45] The important feature of this report was that it recommended liberal abortion laws in India. The committee recommended that the provisions of abortion enshrined in the Indian Penal Code[46] must be considered a "restrictive" provision. The recommendations aimed to reduce unsafe abortions and maternal mortality rates. The report of the committee was accepted by the then government, and the Medical Termination of Pregnancy Bill was introduced in Lok

41 Ch. 6, verses 112.3 and 113.3.

42 Verse 8.35.10-8.35.13, (Apr. 7, 2023) *available at:* https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc836291.html (last visited on May 20, 2025).

43 Ch. 11, verse 87.

44 IPC, 1860, § 312, In the amended IPC, *i.e.*, Bhartiya Nyaya Sanhita, 2023, the corresponding S. is 88.

45 Report of Committee to study the question of legalisation of abortion, (Apr. 7, 2023), *available at*:https://www.indianculture.gov.in/reports-proceedings/report-committee-study-question-legalisation-abortion9 (last visited on May 20, 2025).

46 *Supra* note 25.

Sabha and was passed by the Parliament of India.[47] The *Medical Termination of Pregnancy* (MTP) Act, was implemented in 1972. It legalized abortion in case of existence of certain circumstances to ensure the safety of women. The MTP Act provides the right to exercise her choice of terminating the pregnancy in the case where the pregnancy would endanger the woman's life or seriously harm her "physical or mental health.[48] She can also exercise her right if there is a significant chance that the unborn child would have severe physical or mental defects.[49] The termination of pregnancy can take place if it is between 12 and 20 weeks along.[50] The advice of licensed medical professionals is necessary to terminate the pregnancy.[51] The MTP Act further explains that if the pregnancy is caused by rape, or failure of a device or method used by any married woman or husband to limit the number of children, then such a pregnancy can cause mental anguish to the woman, and it is thus reason enough for termination of pregnancy.[52] Section 3 and 4 shall not be applicable for the termination of pregnancy by the registered medical practitioner where he is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of a pregnant woman. In exceptional cases where the pregnancy exceeds more than 20 weeks, the court will consider the facts and circumstances of the case and can allow the termination on the recommendation of the medical board.

Amendment of MTP Act 1972

The MTP Act was amended in 2021 and adopted a more liberal approach to make it beneficial for women. The Amendment Act provides that for up to 20 weeks of gestation, the opinion of only one medical practitioner is necessary while for termination of a pregnancy between 20 and 24 weeks, the opinions of two medical practitioners are necessary. When a medical board has identified significant foetal anomalies, the upper gestational limit does not apply. The medical practitioner who has terminated the pregnancy is under an obligation not to disclose the identity of the woman i.e. woman's name or any other personal information after she has had her pregnancy terminated, except to a person authorized by law. The Amendment Act is not only applicable to wives but also to unmarried women. It has replaced the word husband with a partner, extending the right of abortion to unmarried women also. Answering the question about the word 'life' under Section 5 of the Medical Termination of Pregnancy Act, D.Y. Chandrachud, CJI remarked that the word 'life' under section 5

47 August 1971.

48 The MTP Act 1971, § 3(2)(i).

49 *Id*, s. 3(2)(ii).

50 *Id*, s.3(2)(a and b).

51 *Id*, s. 3(2).

52 *Id*, Expl. 1 and 2.

cannot be given the same interpretation as under Art. 21 because it would defeat the purpose of the MTP Act.[53]

V Judicial approach to regulation of right to abortion

The turning point in the legislation has been brought about by the judicial pronouncements. They not only filled the gaps between the provisions but also made interpretation easier for the general masses. Thus, this study analyses the various landmark decisions of the court relating to abortion laws and traces the shift in the interpretation of these laws comparatively.

Judicial view in the United States on the law of abortion

The most famous and perhaps the most important judgment in the history of abortion laws in the United States is *Jane Roe* v. *Henry Wade*.[54] Before the case of *Roe* v. *Wade*, the law of abortion was dealt with by various statutory provisions of different states. But this landmark judgment interpreted the law of abortion differently. The issue of this case began with a 21-year-old lady Jane Roe from Texas, getting pregnant with her third child. She didn't want to have the child and wanted to have an abortion done, but the state law of Texas didn't allow it. The law of the state only allowed abortion when the woman's life was at risk. Thus, she challenged the law to be unconstitutional in the Supreme Court.

Appellant's argument of absolute right to abortion

In this case, the appellant/plaintiff claimed an "absolute right to abortion." She claimed that the right to abortion cannot be conditional. A woman has the right to abort a child at any time for any reason. The plaintiff argued that a restriction on the right to abortion of a woman is a violation of the individual right to liberty, guaranteed by the 14th Amendment of the Constitution of the United States. She argued that the said law invaded the rights to marital, familial, and sexual privacy guaranteed by the Bill of Rights.

Respondent's argument of right to life at pre-natal stage

The respondent/defendant, on the other hand, argued for the right to life at the pre-natal stage and protecting the right of the fetus as a person. This argument is based on the idea that a new human life exists at conception. Pre-natal life is said to be included in the State's interest and a general duty to safeguard life. The interest of the embryo or fetus should not take precedence unless the expectant mother's life is in danger and must be weighed against the life she is carrying within her. When these laws were passed, their main goal was to safeguard unborn children.

---

53 *Supra* note 26.

54 410 U.S. 113 (1973).

Balancing approach of court: Recognition of foetal viability

The court heard both sides and also discussed the origin of life as discussed in various faiths. The Supreme Court of America opined that the rights of an unborn person are not fully recognized in law. Therefore, "the word 'person', as used in the 14th Amendment, does not include the unborn." However, the court saw the personhood of a fetus as developing during a pregnancy. Therefore, "it is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved."

The court concluded that "concerning the State's important and legitimate interest in potential life, the 'compelling' point is at viability." This means that in the early stages of pregnancy, abortion cannot be outlawed, but "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Justice Blackmun preferred the point of quickening – when the fetus first begins to move, at around the end of the first trimester – as the emergence of personhood.

The court in its 7:2 verdict agreed that the right to abortion does fall under the right to privacy but did not give it an absolute status. Justice Blackmun observed, that only "compelling state interest" justifies regulations limiting "fundamental rights" such as privacy and that legislators must therefore draw statutes narrowly "to express only the legitimate interests at stake." The court explained the right of each party by dividing the pregnancy into 12-week trimesters, basing the approach on fetal viability. The following points emerged from *Roe* v. *Wade*:

(i) Protection of right to privacy- The right to privacy is protected by the Constitution and includes the choice to have an abortion.

(ii) No state regulation on first trimester- Early in a pregnancy, a fetus is not a person. In the first trimester, the state does not have any right to impose restrictions. The woman can have an abortion done at her choice. The only regulation the state can put is that it has to be performed by a licensed Doctor

(iii) The threat of life is the basis of abortion in the second trimester- In the second trimester abortion can be done only if there is a threat to the life of the woman.

(iv) State can regulate the abortion procedure in the third trimester- At around six months, personhood begins to develop, which warrants a compelling state interest at that time. In the third trimester, the state can regulate the abortion procedures. A pregnant woman will be allowed only if the state's interest in protecting the potential human life outweighs the right to privacy. Abortion can thus be prohibited.

As a result of this judgment, many federal laws in the United States were struck down. Necessary amendments were made to adhere to the decision of the apex court.

This leading case was upheld in the *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* case.[55] In this case, the Pennsylvania Abortion Control Act of 1982 was challenged which mandates the informed consent of the woman seeking the abortion before the procedure and specifies that she be given certain information at least 24 hours before the abortion is performed. It also mandates the informed consent of one parent for a minor to obtain an abortion, but offers a judicial bypass procedure; barring a few exceptions. The married woman must sign a declaration that she has informed her husband. It also defined a medical emergency which allows forgoing all the aforementioned requirements. The court, with a 5–4 majority, upheld the validity of Pennsylvania's laws while once again affirming Roe. The court applied the undue burden test and held that measures must not be an undue burden on the right. An "undue burden" is described as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability". Though the court rejected the rigid trimester framework of *Roe* v. *Wade* but held that unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right. Thus, the Pennsylvanian law was upheld for the most part, except for the spousal notification requirement. The constitutional right to abortion was available till 2022, when again the pro-choice vs pro-life debate was ignited by the judgement in *Dobbs* v. *Jackson*[56] which overruled the *Roe* v. *Wade* judgment and took away the constitutional right to abort. With a few exceptions, Mississippi's "Gestational Age Act" passed in 2018 and outlaws any abortions performed after 15 weeks of pregnancy. The only licensed abortion facility in Mississippi, Jackson Women's Health Organization, and one of its doctors filed a lawsuit in federal district court contesting the statute and asking for an immediate temporary restraining order (TRO). The TRO was granted by the district court during a hearing while the case moved forward with discovery. The state had not given evidence that a fetus would be viable at 15 weeks, and Supreme Court precedent forbids states from outlawing abortions before viability, so the district court granted the clinic's request for summary judgment after discovery and banned Mississippi from executing the legislation. The constitutionality was thus challenged in the Supreme Court of the United States. The court opined that abortion is not mentioned in the Constitution. Neither is it a fundamental right. It is not necessary for "ordered liberty" nor is it ingrained in the history of the country. Chief Justice John Roberts and Justice Samuel Alito both cited Blackmun's assertion that during the Supreme Court

55 *Supra* note 17.

56 *Supra* note 18.

arguments, 'viability was an arbitrary line',[57] thus, the apex court overruled both *Roe* v. *Wade* and *Planned Parenthood* v. *Casey*. This case brought the abortion Jurisprudence back to the 1970s. In the wake of this judgment, many states amended their laws. The prospect that states will implement legislation giving fetuses and even embryos the same rights as people is one of the Dobbs decision's most alarming repercussions. The concept of fetal personhood was rejected by Roe, which Dobbs overruled. The majority in Dobbs makes it clear that they do not express an opinion on the value of fetal personhood. As a result, the court defers to the states on the question of fetal personhood. This could result in legislation giving a fetus personhood status, which in turn could have an impact on IVF-related laws.

Judicial view on the right to abortion in India

In India, judicial activism has been quite high in the domain of abortion regulations. In the historic Suchita Srivastava case[58] the Supreme Court determined that Art. 21 of the Indian Constitution[59], which protects the right to life and personal liberty, has a wider scope that includes a woman's freedom to make reproductive decisions. These rights are part of Article 21-guaranteed women's right to privacy, personal liberty, dignity, and bodily integrity.

Further, in the case of *Hallo Bi* v. *State of Madhya Pradesh,*[60] the High Court of Madhya Pradesh pronounced the judgment that victims of rape can have access to abortion without the prior requirement of judicial authorisation and the court also stated that one cannot coerce a victim of violent rape /forced sex to give birth to a child of a rapist because the humiliation suffered by the petitioner will certainly cause a grave injury to her mental health. Keeping in mind, Article 21 of the Indian Constitution, the *Puttaswamy* case[61] judgment particularly upheld women's fundamental freedom to choose their reproductive options. The panel also reaffirmed the viewpoint taken by a three-judge panel in *Suchita Srivastava* v. *Chandigarh Administration,*[62] which held that a woman's right to reproductive freedom includes the right to carry a pregnancy to term, give birth, and raise children afterwards and that these rights are an integral part of her right to privacy, dignity, and bodily integrity.

The Indian courts have always been liberal while deciding on the issues of abortion, often going beyond to safeguard the physical and mental health of the women. *In. X*

57 It was evident from the Blackmun Memorandum on Roe v. Wade, (Sept 22, 2023), *available at:*https://www.justfacts.com/abortion.blackmun.asp.(last visited on May 20, 2025).

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

59 The Constitution 1950, art. 21 says that no person shall be deprived of his life or personal liberty except according to procedure established by law.

60 *Hallo Bi* v. *State of Madhya Pradesh*, 2013 (1) MPHT 451 (India).

61 *Puttaswamy (Retd.), Justice K.S.* v. *Union of India* 2017 SCC 1 (India).

62 *Supra* note 37.

v. *State of Uttarakhand*,[63] the high court allowed the abortion of a 28-week, 5-day-old fetus of a 16-year-old girl. The single judge bench presided by Justice Alok Kumar Verma held that "*Right to life means something more than survival or animal existence. It would include the right to live with human dignity*." The court referred to *Murugan Nayakkar* v. *Union of India,*[64] wherein the Supreme Court has allowed abortion beyond the prescribed time limit for a 13-year-old rape survivor. The high court relied on the medical report which said, there was no harm to the pregnant woman. The single-judge bench held that there is a right to terminate pregnancy on the ground of rape. A rape victim has a right to choose to carry. She also has the right not to carry a pregnancy subject to the conditions as enumerated under the provisions of the Act."

In 2022, the issue of the right to abortion was again raised before the apex court in the case of *X* v. *The Principal Secretary, Health* and *Family Welfare Department, Govt. NCT of Delhi.*[65] The woman or the appellant, was a 25-year-old unmarried Indian citizen. When she filed the Writ Petition with the High Court of Delhi, she was pregnant with a single fetus at 22 weeks of gestation. The pregnancy arose from a consensual relationship. Further, she wished to terminate her pregnancy as "her partner had refused to marry her at the last stage" She decided not to carry the pregnancy because she was wary of the "social stigma and harassment" about unmarried single parents, especially women. She told the court that in the absence of a source of livelihood, she was not mentally prepared at all to "raise and nurture the child as an unmarried mother." The Petitioner (appellant) argued that continuing the unwanted pregnancy would pose a significant and severe risk to her mental health. Consequently, she sought permission to terminate the pregnancy pursuant to Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971, and Rule 3B(c) of the Medical Termination of Pregnancy Rules, 2003.

However, the High Court of Delhi denied the petitioner's request, ruling that since the pregnancy resulted from a consensual relationship, it did not fall within the purview of any clauses under the 2003 Rules. As a result, the court determined that section 3(2)(b) of the Act was inapplicable to the case. The appellant took this decision to the Supreme Court. The Supreme Court overturned the high court's ruling and authorized the petitioner to terminate her pregnancy.

The court held that unmarried women have the same freedom of choice about childbearing as married women under article 21, which includes rights to reproductive autonomy, privacy, and dignity as well. The judgment has significant implications for defending the rights of women to choose on the following grounds:

---

63 2022 SCC OnLineUtt 61 (India).

64 2007 SCC OnLine SC 1092 (India).

65 Special Leave Petition (Civil) No. 12612 of 2022 (India) and Civil Appeal No. 5802 of 2022 (India).

(i) The Right to reproductive autonomy

Reproductive rights encompass a spectrum of freedoms: access to education and information regarding contraception and sexual health; the ability to decide on the type and use of contraceptives; the right to determine whether and when to have children; the liberty to choose the desired number of children; access to safe and legal abortions; and the right to comprehensive reproductive healthcare. Additionally, the exercise of these rights necessitates autonomy for women, ensuring their decisions are free from coercion or violence.

(ii) Right to dignity

The concept of dignity has been established as an integral element of the right to life and liberty enshrined in Article 21. Denying women autonomy over their bodies and, by extension, their lives, constitutes a violation of their inherent dignity. The right to self-determination, encompassing both momentous choices concerning the trajectory of one's life and seemingly trivial decisions related to daily activities, falls within the ambit of the right to dignity. Were women compelled to carry unwanted pregnancies to term, this very right would be fundamentally undermined.

(iii) Purposive interpretation of rule 3B

The court held that in a case where two possible constructions of an existing provision are possible, courts ought to go with the construction that makes the provision effective rather than which makes the provision inoperative. The courts must put forward such a construction that speaks in favour of the constitutionality of the statutory provision. The interpretation of statutory provisions that is narrow and strict in nature and which go against the constitutional mandate should not be taken into consideration. Additionally, in this landmark decision, the term "woman" was used to refer to anyone who would need access to safe abortion. The Indian Courts have always kept the interest of the female above everything. Today, when the West has gone 50 years back, through its judicial decision, Indian courts have taken a very progressive approach and set a line for the world to look up to us.

VI Conclusion

Two verdicts, each in the United States and India, have contradictory legal dispositions to each other. These leading cases make a shift in paradigm in both countries in the 21st Century. The case of *Roe* v. *Wade,* according to Justice Samuel Alito, was decided "egregiously wrong" because "the Constitution makes no reference to abortion" and "no such right is implicitly protected by any constitutional provision," including the due process section of the Fourteenth Amendment. In his majority decision, Justice Alito went to great lengths to limit his discussion to abortion solely. He made the distinction between abortion and other concerns by pointing out that it affects potential life. He further pointed out that abortion had no place in American history or customs.

Justice Alito's promise that Dobbs has no impact on matters except abortion would be reading it too simply, defeating the purpose of analysis and interpretation. In his concurrence opinion, Justice Clarence Thomas suggested that the Supreme Court "should reconsider all of (its) substantive due process precedents, including Griswold, Lawrence, and Obergefell." According to Justice Clarence Thomas, who has long been opposed to any unenumerated rights impliedly protected by the Constitution.

The Indian judiciary has adopted a more progressive stance, recognizing the right to abortion as derivative of a woman's right to reproductive autonomy, dignity, and privacy. In a landmark decision, a three-judge bench of the Supreme Court rejected the previously restrictive interpretation of the five-decade-old abortion law. This apex court ruling significantly reshaped abortion law in India by extending the right to both married and unmarried women, aligning with constitutional principles. The court determined that the rights to reproductive autonomy, dignity, and privacy enshrined in Article 21 empower unmarried women with the same right of choice as married women regarding childbirth between twenty and twenty-four weeks of pregnancy. Therefore, the court deemed it unnecessary to rule on the Act's (MTP Act) constitutional validity. The implications of these diverse changes, in the laws of abortion in both countries, will be best judged with time alone. We need to move to practical judgments that reflect the mind and heart of the 21st Century society, rather than basing them solely on the principles of law, because ultimately "*Law reflects but in no sense determines the moral worth of the society.*"[66]

66 Grant Gilmore, *The Ages of American Law* (Yale University Press, 2nd edn., 1977).