

## Transformative Constitutionalism and Women: Abortion Rights in India & America

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### ABSTRACT

The issue of abortion has been hotly debated in the U.S. and India since the early seventies. The nucleus of the concept of abortion lies in the debate of rights of an unborn child as against the rights of women's bodily autonomy and personal choice. In the last 30 years over 60 countries have made strides with respect to framing abortion laws and overlooking its effective implementation. Abortion is still prohibited in 22 countries and to which there is a new shocking addition of USA which has overturned its earlier progressive judgement on abortion-Roe v. Wade.<sup>1</sup> On the other hand Indian judiciary has made progress in securing a safe and broad spectrum of abortion rights for women in 2021, by amending Medical Termination Act of 1971 to increase the upper gestational limit from 20 to 24 weeks for specific categories of vulnerable women, and removed it altogether in case where the foetus is diagnosed with substantial abnormalities by a medical board. In this article an attempt has been made to delve into history of abortion rights in India and America. Through the meticulous examination of landmark cases like Roe v. Wade and Dobbs v. Jackson it presents a comprehensive overview of evolution of abortion rights in America. Latest transformative judgements of the Supreme Court are also discussed lending new insights into current status of abortion rights in India.

**Keywords:** Transformative Constitutionalism, Judiciary, Abortion Laws, Reproductive choice, Gender Justice.

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### 1. Introduction:

"No woman can call herself free until she can choose consciously whether she will or will not be a mother"

Margaret Sanger

Any reproductive choice is a decision having a direct impact and the greatest bearing, only on the concerned individuals. Like marriage and other aspects of family life, which have a limited effect on the community, it is an area ordinarily left to individual decision-making. Thus, by its very nature, the right to reproductive choice is an aspect of the right to privacy or the "right to be let alone." On one hand, women may be forced to undergo abortion even when they don't want to with female foeticides. On the other, she may be compelled to reproduce against her wishes. Stereotypical depictions of women as homemakers and mothers only contribute to these factors.

As a result, women often resort to illegal or unsafe abortion methods. Studies have estimated that millions of women undergo abortion each year and over 50% of those are done in highly unsafe environments. Neither the Indian nor the U.S. Constitution explicitly recognizes the right to procreative choices or even the broader concept of the right to privacy.<sup>2</sup>

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<sup>1</sup>Palak Thakkar, The curious case of fetal viability, *available at*: <https://www.livelaw.in/lawschool/articles/roe-v-wade-medical-termination-of-pregnancy-amendment-act-2021-aiims-fetal-viability-abortion-case-reproductive-rights-241191> (last accessed on 15 December, 2023).

<sup>2</sup> S bhoite, "Comparative study of abortion laws in India and USA" *Dnyanamay Journal* 22 (2017).

In an iconic judgement in September 2022, the Supreme Court of India gave a verdict that the choice of abortion is central to the bodily autonomy of women. Moreover, an amendment has been made in MTP Act, also where gestational limit has been increased from 20 to 24 weeks for “certain categories of women”.

## **2. Reproductive Rights and Transformative Constitutionalism:**

Reproductive rights are essential for women to enjoy their human rights. These rights are centred on women’s ability to make the best choices for their lives, including around the number of children they have, if any, and the spacing between their children’s births. Reproductive rights include prenatal services, safe childbirth, and access to contraception. They also include access to legal and safe abortion.<sup>3</sup> In order to achieve this vision, communities must have access to material resources to exercise self-determination.<sup>4</sup> Reproductive rights requires a societal commitment to dismantling systems of oppression and creating enabling conditions to ensure not only that people can choose and access contraception and abortion but also that they can make autonomous decisions about procreation and parenting.

Just as Reproductive rights activists and scholars have recognized the shortcomings of the traditional liberal conception of rights, countries around the world also have found “Constitutionalism” inadequate to address the material conditions that prevent people from realizing their rights. As an alternative, the term “transformative constitutionalism” was developed by Professor Karl E. Klare in 1998 to describe the constitutional approach adopted by South Africa after apartheid. He defined transformative constitutionalism as the project of “transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction” and accomplishing “large-scale social change through nonviolent political processes grounded in law. Unlike the classic liberal constitutional model, transformative constitutionalism does not stop at formal legal equality. Instead, it emphasizes substantive justice and requires that the state “ensure that rights are indeed enjoyed.

Given the entrenched nature of many of the power inequities that facilitate reproductive oppression, to achieve reproductive justice Indian judiciary has adopted a transformative approach in the past one decade. Where it has delivered numerous judgements on abortion rights of women and thereby has delivered gender justice. On the other hand, American judiciary has taken a regressive step by overturning its 50 decades old judgement of *Roe v. Wade* and thereby has deprived American women of their right to abortion.

## **3. History of abortion laws in India and USA:**

In America, “*Abortion is one of the most controversial issues*” and has divided the country into two groups i.e. “pro-choice” and “pro-life”. The advocates of pro-choice claim that the women have the right to make reproductive choices. They are the ones who support abortions. The advocates of pro-life claim foetus qualifies as a “constitutional person” and has a right to life. They are the ones who are against abortions. They are mostly those who are guided by “religious beliefs and include the Catholic Church, fundamentalist Protestants and Orthodox Jews”.

Abortion became legal in all the states of US in 1973 only, after the case of *Roe v. Wade*<sup>5</sup> which recognized a pregnant woman’s constitutional right to abortion in US. Court in this case had rejected the claim that foetus is a person. In this case, the Court also held that the right of privacy under the U.S. Constitution is broad enough

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<sup>3</sup>Reproductive rights and abortion, available at: <https://www.hrw.org/topic/womens-rights/reproductive-rights-and-abortion>, (last accessed on 23 December, 2023).

<sup>4</sup>Synthia Soohoo, “Reproductive Justice and Transformative Constitutionalism” available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3940581](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940581) (last accessed on 21 December, 2023).

<sup>5</sup>*Roe v. Wade* 410 U.S. 113 (1973).

to protect the right to abort. This case had laid down a *trimester test*, according to which the government could not prohibit the abortion but could only regulate in first and second and in third trimester it can prohibit abortions except to save the life or health of the mother.

Later in the case of *Parenthood v. Casey*<sup>6</sup> US Supreme Court had struck down the Pennsylvania's abortion law partially which required a woman who is married to notify his husband before getting abortion done, but the court had upheld remaining provisions of this Act that required the waiting period, informed consent etc. In this case the court had reaffirmed the viability criteria but replaced strict scrutiny test with *undue burden test*.<sup>7</sup> In contrast to the earlier situation in which the State had to show a compelling interest for imposing the restrictions, the onus is now on the woman to show that the regulation places an "undue burden" on her reproductive choices.<sup>8</sup>

On the other hand, India is amongst the first few countries to legalize abortion. The act for the provision of termination of pregnancy is known as the medical termination of pregnancy (MTP) Act, 1971.<sup>9</sup> The law was formed to reduce the instances of illegal abortions. It was enacted to encourage family planning and population control. Before 1971, termination of pregnancy through induced abortion was considered a crime and punishable offense under section 312 of IPC.<sup>10</sup> This led women to resort to abortion secretly, by an unskilled provider or not in the best of situations and methods, resulting in higher complications, morbidity, and mortality. Hence, MTP law was enforced in 1972 except in Jammu and Kashmir.<sup>11</sup> According to the Act, a physician can order the termination of a pregnancy up to 12 weeks, but between 12 and 20 weeks, two physicians' opinions are necessary.

An amendment to the MTP Act 1971 was made in 2021, in which the gestation limit was increased from 12 to 20 weeks to now from 20 to 24 weeks. Again, the condition between these two weeks would be decided by consultation with a medical practitioner. Until 20 weeks, one could go ahead with an abortion on the advice of one doctor, but for 24 weeks, a second opinion was mandatory. The 24 weeks extension in the MTP Act had an additional clause about specific conditions under which abortion could be performed: pregnancy as a result of sexual abuse, in case of being a minor, etc.<sup>12</sup>

The current abortion policy is towards the improvement of availability, accessibility, and safety of induced abortion. But still, difficulties are faced due to uneven expansion of facilities and uncertified centres in large states.<sup>13</sup>

#### 4. Judicial Developments in India: Being progressive

While India's abortion laws have changed over the last 50 years to seem more progressive, historians and legal experts claim that they are still not based on the tenets of reproductive justice. The Supreme Court acknowledged that women's freedom to choose their reproductive options falls within the purview of the right to life under Article 21 of the Constitution in a landmark decision in the *Suchita Srivastava v. Chandigarh*

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<sup>6</sup>*Parenthood v. Casey* 505 U.S. 833 (1992).

<sup>7</sup>Chinki Verma, "Abortion Questions Answered Differently By Two Common Law Nations: A Comparative Study of The Abortion Jurisprudence In India and USA" 1 *Journal of Law and Legal Studies* 1 (2021).

<sup>8</sup> *Supra* note 2, at 21.

<sup>9</sup>The Medical Termination of Pregnancy Act, 1971.

<sup>10</sup>The Indian Penal Code, 1860, s.312.

<sup>11</sup>Trishi Anand, "Abortion Laws in India: A Critical Analysis", 7 *International journal of mechanical engineering* 64 (2022).

<sup>12</sup>Priyanka Tripathi, Reproductive Justice Discourse vis-à-vis Abortion Law in India: A Critical Review, space and culture in India 6-13 (2023).

<sup>13</sup>Krupa H Shah, "Induced Abortion across the World and Evolution of Medical Termination of Pregnancy Law in India: A Review" *Journal of South Asian Federation of Obstetrics and Gynaecology* 426-430 (2022).

*Government* case.<sup>14</sup> In this case an important question regarding reproductive rights of mental retarded/disabled women was involved. An orphaned woman living in a government run welfare institution in Chandigarh, who had the mental capacity of a nine-year-old, was raped, and subsequently became pregnant while she was living in that institution. The appellant in this case wanted to continue the pregnancy. During the proceedings of the case the question before high court was can it order the termination of a pregnancy without the agreement of the woman involved. The MTP Act “clearly respects the personal autonomy of mentally retarded persons who are over the age of majority”, according to the Court. After reviewing mental disability statutes, the Court determined that there is a legal distinction between mental retardation and mental disease. Under Section 3(4)(a) of the MTP Act, a guardian can make decisions on behalf of a person with mental illness, but not on behalf of a person with mental retardation, such as the Appellant. The Court found that because the pregnant woman’s agreement is an important criterion under the MTP Act, its dilution could not be permitted because it would “amount to an arbitrary and unreasonable restriction on the victim’s reproductive rights.”

In the case of *State of Rajasthan & Ors. v. S & Anr*<sup>15</sup>, the Rajasthan High Court passed a significant judgment which made significant remarks about reproductive choices of a rape victim. The division bench comprised of Sandeep Mehta, J. and Dr. Pushpendra Singh Bhati, J. held that “the right of a child rape victim to make the reproductive choice of terminating the foetus heavily outweighs the right of the child in womb to be born even where the pregnancy is at an advanced stage”. Court also observed that “While directing that the rape victim shall deliver the child, the learned Single Bench failed to consider the fact that the personal liberty of the woman was being impinged upon on two counts i.e. on her right to make a reproductive choice as well as posing a grave injury to her mental health and causing her Mental Trauma”.

Recently, the Supreme Court of India’s judgement on 29th September, 2022, held that unmarried women have the same right to abortion as married women. In *X v. the Principal Secretary Health and Family Welfare Department & Another*<sup>16</sup> decided by a three-judge bench of the Supreme Court, the anonymous Petitioner learned that she was pregnant in June 2022. On 5 July 2022, an ultrasound revealed an intrauterine pregnancy of 22 weeks. She moved a petition before the High Court of Delhi with a request to terminate her pregnancy through registered medical practitioners (RMPs) at a private or government centre or hospital before 15 July 2022, during the statutory limit of 24 weeks. One of her prayers to the Court was to include unmarried women within the scope of Section 3(2)(b) which governs the termination of pregnancies between 20 to 24 weeks of gestation. The High Court held that since the Petitioner is an unmarried woman whose pregnancy arose out of a consensual relationship, her case is “clearly not covered” by clauses of Rule 3B of the MTP Rules. As a consequence, her termination request was denied. A Special Leave Petition was then filed before the Supreme Court, which found that the principle of statutory interpretation is that the words of a statute must be read in their entire context and thereby unmarried women were given equal rights of abortion as that of married women.

The Supreme Court while delivering a landmark judgement emphasised that in a gender-equal society, it is imperative that interpretation of the MTP Act and Rules consider current social realities. Speaking for the bench, Justice Chandrachud noted, “A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing social context and advance the cause

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<sup>14</sup>(2009) 9 SCC 1.

<sup>15</sup>Spl. Appl. Writ No. 1344/2019.

<sup>16</sup> X v. Principal Secretary. Health and Family Welfare Department, 2022 SCC OnLine SC 1321.

*of social justice*". This judgement and the recent amendment Act together significantly expanded the scope of abortion rights in India. The most important changes to the law are explained below:

First, the Court held that every pregnant person in India has a right to reproductive decisional autonomy, including transgender and gender-variant persons. Everyone is entitled to reproductive health, including access to safe, effective, and affordable methods of family planning, access to contraception, and sex education. Further, the Court held that the decision to terminate a pregnancy vests solely with the pregnant person.

Second, the Court expanded the scope of access to abortion services from 20 to 24 weeks, taking note of the factors and circumstances changing the material realities of women and how individuals' unique circumstances cannot be exhaustively accounted for by the law. The Court held, "*the decision to give birth to and raise a child is formed by one's material circumstances, which includes the situational, social and financial circumstances of a woman and her family and each of these is relevant to her decision to carry the pregnancy to term*".

Third, the Court clarified that rape as grounds for abortion includes marital rape. The Court noted, "*It is not inconceivable that married women become pregnant as a result of their husbands having 'raped' them.*" It is important to clarify that the Court noted that rape should include marital rape for the purpose of the MTP Act, and that reading the provisions of the MTP Act in a manner that excludes married women who maybe pregnant as a result of forced or abusive sexual conduct of their husbands would compel them to have children with abusive partners.

Fourth, the Court empathetically noted that the MTP is a beneficial legislation meant to enable access to abortion services for all pregnant persons. Therefore, the RMP's should offer abortion services without any extra-legal conditions like spousal or family consent, documentation requirement or judicial authorisation.

Further the Court harmoniously read the MTP with POCSO and held that medical practitioners do not need to disclose the identity and personal details of an adolescent seeking an abortion, when filing their report under Section 19 of the POCSO Act. It emphasised that "it could not possibly be the legislature's intent to deprive minors of safe abortions."<sup>17</sup>

In this manner, these judgments delivered by Indian courts have set a significant precedent for reproductive rights of women in India. It reinforced the recognition of the right to reproductive autonomy and privacy as a fundamental right protected under Article 21 of the Constitution. The decisions also emphasized the importance of gender equality in matters of reproductive health and family planning, directing the State to adopt a more inclusive and rights-based approach to population regulation. Through these judgements Indian judiciary has broadened the definition of reproductive rights by placing abortion in the context of constitutional rights, such as the right to reproductive autonomy, the right to equality, and the right to privacy.

### **5. Judicial Developments in America: Being Regressive**

On June 24, 2022, the Supreme Court of the United States decided the case *Dobbs v. Jackson Women's Health Organization*, which called into question Mississippi's Gestational Age Act. This new law outlaws abortion, except to save the life of the pregnant woman or in the case of severe fetal abnormality, after 15-weeks' gestation. Six of the nine justices voted to allow Mississippi's ban to move forward, thereby overturning the 1973 Supreme Court case *Roe v. Wade* and the 1992 Supreme Court case *Planned Parenthood v. Casey*. In

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<sup>17</sup>Dipika Jain, "Supreme court of India judgement on abortion as a fundamental right: breaking new ground, sexual and reproductive health matters" 1-3 (2023).

effect, the Dobbs decision eradicated the federal protections of women's rights to abortion, relegating the decision back to the individual states.

The decision has sparked dramatic shifts in the abortion landscape in the United States. According to new data from the Guttmacher Institute, 92,100 patients travelled across state lines for abortion care in the first six months of 2023.<sup>18</sup> The Supreme Court's momentous decision in *Dobbs v. Jackson Women's Health Organization*<sup>19</sup> represents a sea change not only in constitutional law but in the public health landscape. The decision almost immediately wreaked havoc in the delivery of medical care not only for patients seeking abortion care, but also for patients not actively seeking to terminate a pregnancy.<sup>20</sup>

Recently, a Texas woman, 31-year-old Kate Cox has been a victim of this new amendment. She had to flee the state, to end a pregnancy where the fetus had a fatal condition. She was said by her doctor that it would jeopardize her life and future fertility.<sup>21</sup> The state's Republican-dominated Supreme Court wanted more guidance from the state's medical board before granting an exception.<sup>22</sup>

By imposing such decision making to its states, the United States of America has no longer been cohesive, but has instead inhabit a balkanized world fraught with interstate conflict. Thereby, twenty-six states within US has banned abortion immediately and also there is a return of criminalization of abortion in most of the states. The freedom that was recognised in the cases, whether it was called "privacy" as in the *Roe v. Wade* decision or "liberty interests" as in the *Casey* decision, was the very foundation of the clinician-patient relationship. The potential for wide-ranging consequences comes from the fact that the Court has not only reversed *Roe* and *Casey*, but also assailed their core rationale and relevance as long-standing decisions. *Dobbs* also raises the spectre of state regulation of other health care decisions, such as those pertaining to contraception, end-of-life care, care for LGBTQ patients, in vitro fertilisation, and other fertility treatments. These are all examples of decisions that the States could potentially regulate.<sup>23</sup>

## **5. Conclusion**

Thus the decision of *Dobbs* has raised an alarming consequences not only in America but also beyond its territories and can affect the abortion rights globally. Several developing countries can use the same as a precedent and curb the abortion rights of the individuals and may raise a question of debate whether the unborn child's right to life is to be weighted more in comparison to the fundamental right of the women, which can create a havoc in countries where there is already an established law for right to abortion. On the contrary, in India, the 1971 MTP Act was itself forward-thinking when it was passed and thereafter the by implementation of the Amendment act 2021, the abortion barrier was raised to cover unmarried women and medical breakthroughs in the area were taken into consideration. Thus as a consequence it is anticipated that

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<sup>18</sup>Fighting for their lives: women and the impact of abortion restrictions in post-roe America available at: <https://abcnews.go.com/US/fighting-lives-women-impact-abortion-restrictions-post-roe/story?id=105563174>, (last accessed on 14 February, 2024).

<sup>19</sup>*Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S., (2022).

<sup>20</sup> Maya Manian, "The Impact of *Dobbs* on Health Care Beyond Wanted Abortion Care", 51 *The Journal of Law, Medicine & Ethics*, 595 (2023).

<sup>21</sup> Zachary B Wolf, "An abortion rights horror story explains the new reality for some American women", available at: <https://edition.cnn.com/2023/12/14/politics/abortion-rights-what-matters/index.html>, (last accessed on 17, December, 2023).

<sup>22</sup> Bertha Alvarez Manninen, "A Critical Analysis of *Dobbs v. Jackson Women's Health Organization* and the Consequences of Fetal Personhood", 32 *Cambridge quarterly of healthcare ethics* 363 (2023).

<sup>23</sup> Ramit Mehta and Rajat Rathi, "Critical analysis: Abortion rights in US being regressive while in India are progressive", available at: <https://theguardian.com/critical-analysis-abortion-rights-in-us-being-regressive-while-in-india-are-progressive/> (last accessed on 20 December, 2023).

the current status of abortion laws in US is on a downward spiral while, India, on the other hand, has always taken a more progressive posture. In the past one decade Indian judiciary has delivered numerous progressive judgements on abortion rights of women which makes India one of the nations which allows legal abortions on a broad range of therapeutic, humanitarian and social grounds. So, the above information establishes the difference between the abortion laws of the two countries and a comparison between them that how one state recognizes abortion as a matter of constitutional right whereas the other has a different opinion on it.