

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

---

Volume 3 | Issue 6

2021

---

© 2021 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

---

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

To submit your Manuscript for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at [submission@ijlsi.com](mailto:submission@ijlsi.com).

---

# Reproductive Justice vis-à-vis Women Rights: A Comparative analysis between U.S and India

---

SHYAMALI KUMAR<sup>1</sup>

## ABSTRACT

*This research paper is an effort to understand the intricacies of women rights in US and India through a minute examination of the legislations in place for both the countries. Since women rights have often been a subject of discourse in all forms of civilized societies, whether it is a developed nation like America that is believed to provide women with larger and more varied choices when it comes to their reproductive health or India wherein the choices of women are often limited due to various social and economic factors that play a significant role in the society. The full realization of their rights, however remains a debatable issue in both the countries as women continue to demand and strive for progressive changes through legislations.*

## I. INTRODUCTION

Women comprise of almost half of the world population, however their condition all across the globe still remains very much a poor one. They struggle to actualize their basic human rights of living with dignity on a regular basis due to the excessive numbers of crimes happening against them worldwide. Not only that, they are often deprived of their other basic forms of human right as well. In the 1993 World Conference on Human Rights that was held in Vienna the concept of inclusion of the reproductive rights of women as a form of human rights was first discussed. The term reproductive justice was coined in the year 1994 at the International Conference on Population and Development

hosted in Cairo by African American women who felt that reproductive health does not merely include an individual choice to health but it is affected by a multitude of factors such as the community, living condition and economic condition of a woman. They claimed that not all women are given equal opportunities to exercise their reproductive rights and hence there exists a divide between women in terms of how accessible basic facilities such as sex education, contraceptive devices etc. are to women belonging to different caste, color, creed, religion etc. Later in 1995, at the Fourth World Conference of Women held in Beijing, the correlation between reproductive rights and reproductive health was discussed at length.

---

<sup>1</sup> Author is an Academic Tutor and TRIP Fellow at Jindal Global Law School, India.

More often than not, the concept of reproductive rights, reproductive health and reproductive justice is either clubbed together to denote the same concept or are used interchangeably. However, it is imperative to understand that all these three concepts are to be understood differently in the light of different paradigm.

India while addressing its major issue of population control has tackled the situation differently. There are issues that are blatant such as the forced sterilization. The issue of abortion too takes a very cultural turn wherein women who view abortion as an option for themselves are often shamed and ostracized from the society due to the common beliefs of the culture stemming from the fact that women who conceived before marriage were considered to have lost their purity and sanctity and were considered as a dark spot for the family and society as whole. Instead of providing them with care and nurturing, the society often secludes them.<sup>2</sup> They are not provided with adequate facilities such as pre natal as well as post natal care that is required during the time of pregnancy. Women in India are also never exposed to sexual education so that they are able to make an informed choice about indulging in sexual activities or refraining from it. On the other hand, the topic of sexual intercourse is attached with a lot of stigma and negative connotations that makes it very difficult for the women to be able to discuss such matters with

their families or an adult who could guide them without making them feel guilty or ashamed.<sup>3</sup>

### (A) What are Reproductive Rights?

The World Health Organization (WHO) defined reproductive rights as “*the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.*”<sup>4</sup>

Reproductive Rights therefore include a plethora of rights such as<sup>5</sup>:

- Right to Life, Liberty and Security
- Right to Health, Reproductive Health and Family Planning
- Right to Decide the Number and Spacing of Children
- Right to Consent to Marriage and to Equality in Marriage
- Right to Privacy
- Right to be Free from Discrimination on Specified Grounds
- Right to be Free from Practices that Harm Women and Girls

<sup>2</sup> Vanessendelft, ‘History of the Association for Voluntary Sterilization’ [1971] PL 482

<sup>3</sup> Donald T. Critchlow, ‘Intended Consequences: Birth Control, Abortion, and the Federal Government’ [1999] Oxford: Oxford University Press 42

<sup>4</sup> Goodrich C. Schauffler, ‘Tell Me Doctor . . .,’ (1959) 76 LHM 22

<sup>5</sup> *Ibid*

- Right to not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment
- Right to be Free from Sexual Violence
- Right to Enjoy Scientific Progress and to Consent to Experimentation

On paper the definition of reproductive rights appears to be quite inclusive as well as wholesome in nature. However, there has been an alternate movement that was pushed forward by women of color especially in the United States as they believed that they were a part of the neglected group that failed to realize their rights as the country fails to provide Universal Health Care to all the women.<sup>6</sup> The funding for such women health clinics that provide free and safe abortion treatments or other contraceptives have been highly influenced by the political scenario of that particular state. If the position of power and authority is held by highly religious individuals, there are strong chances of such medical treatments being opposed.

The movement of reproductive justice has a more multi-dimensional approach. It refers to not only the legal right given to an individual with regard to their exercise of parenthood but entails a plethora of other sub topics such as the inclusion of access to such facilities for women who are often not included into the mainstream bracket while such discussions are held.

The movement of Reproductive justice gained momentum when it was materialized that women

of color especially the Black women do not have autonomy over their own bodies and hence they are unable to exercise their legal rights relating to reproduction to the core. This will include access to quality health care, housing and education along with a proper minimum living wage. These are the basic requirements for safe and dignified child birth as well as parenting for both the parent and the child.

Reproductive rights have been included as a form of human rights by the World Conference on Human rights in the year 1993 in Vienna.<sup>7</sup> The concept of human right derives its power from the basic source that a government owes a certain level of duty of care towards the subjects it governs. These rights are therefore provided to the subjects to allow them the opportunity to protect themselves from any kind of differential treatment that is meted out to them by the government. These rights therefore can be broadly categorized into two large group of rights. The first being the positive rights. The positive rights are forms of rights that demand an affirmative action on the part of the government to enable its citizens for proper actualization of their freedoms and to extract the benefits of living in a society.<sup>8</sup> Positive rights would obligate the government to take necessary steps to guarantee health care especially universal health care to all of its citizens at large.

On the other hand, there are negative rights that require the government to refrain from partaking in any activity that might hinder the actualization

<sup>6</sup> Dudley W, *Reproductive Rights* Greenhaven Press (2006)

<sup>7</sup> World Health Organization, 'Expanding access to health services with self-care interventions' (24<sup>th</sup> June,

2019)

<sup>8</sup> Commonwealth of Independent States, 'Report of the Conference' (4 July 1996) CISCONF/1996/6

of rights for the group of people. For example, if the government interferes with the safety and dignity of reproducing persons, then it can be said to be against their rights of humanity. Protecting people against this interference is crucial to ensuring the human rights of all because all of us have the human right to be fertile, the human right to engage in sexual relations, and the human right to reproduce or not, and the human right to be able to care for our children with dignity and safety is what includes the reproductive rights of an individual.

### **(B) What is Reproductive Justice?**

The concept of reproductive justice cannot be understood in isolation. It has to always be read with the concept of evolution of society and its societal norms that have finally shaped the idea of reproductive rights and therefore in furtherance, the concept of reproductive justice for women at large. The first and foremost concept to be recognized here is that from time immemorial i.e., before there was a solid concept of government and during times that many countries in the world depended on the church to make laws for the people to be governed with, the idea of reproductive rights or autonomy of a female over her own body has been significantly challenged. For example in many religious scripts, abortion is considered to be a sin and hence not allowed at all. This total ban was especially exercised by the Catholic Churches

that believed that a fetus is a person from the time of its conception and hence any measure to end a pregnancy is therefore considered to be a murder since the fetus is considered as a human being holding all the rights that are guaranteed to any person under the catholic theology.<sup>9</sup>

This belief stems from the natural law jurisprudence<sup>10</sup> that was propagated by prolific thinkers such as Socrates, St. Thomas Aquinas. A pregnancy was also considered to be the will of the God<sup>11</sup> and by aborting the child it was assumed that the individual is going against the will of the God himself and hence such a ban was put in place to deter women from aborting the baby. Infact, a lot of old thinkers seemed to believe that the only punishment for committing abortion is homicide as the Bible does not allow any person to murder another being. Therefore, abortion being considered as a quick murder even in cases wherein the conception had been fairly new was subjected to the harshest punishment.<sup>12</sup> However, this was a clearly faulty example since the church itself in order to punish a person who had committed abortion was responsible for committing the sin it forbade i.e., murder.

However, with the passage of time and the popularity of feminism gaining momentum, women began to realize that there is a requirement for them to be able to exercise autonomy over their bodies. This was majorly dealt with in the second wave of feminism<sup>13</sup>

<sup>9</sup> Donald T. Critchlow, 'Intended Consequences: Birth Control, Abortion, and the Federal Government' [1999] Oxford: Oxford University Press 42

<sup>10</sup> *Ibid*

<sup>11</sup> Goodrich C. Schauffler, 'Tell Me Doctor . . .', (1959) 76 L.H.J 22

<sup>12</sup> Donald T. Critchlow, 'Intended Consequences: Birth Control, Abortion, and the Federal Government' [1999] Oxford: Oxford University Press 42

<sup>13</sup> *Reproductive Rights: a Political, Professional, and Personal Issue* Distributed by ERIC Clearinghouse (1992)

wherein the white feminists who took the forefront in the movement felt that the highest form of autonomy to be granted to a woman would be by legalizing the abortion right in the healthcare sector. This did prove to be a huge step towards the actualization of reproductive rights since women were now able to choose whether or not to carry out an unwanted pregnancy to full term. The monumental judgment that decided this was the American judgment of *Roe v. Wade*<sup>14</sup> which affirmed that safe and legal abortion was a constitutional right under the American Constitution. The American Constitution protects the rights of a person to make their own medical decisions<sup>15</sup> including the decision to have an abortion and this was the principle laid down in the case of *Roe v. Wade*.<sup>16</sup> However, this was just the tip of the problem that lied beneath the entire issue of women's health rights. Although the white feminists pressed highly upon the need for women to be granted abortion rights so as to disallow the unequal distribution of power against men and women and to allow women to retain autonomy over their bodies, but for many women of color the struggle was totally different and the movement provided little to no help to the minority especially the black women who were often

marginalized in the women's movement for civil rights.

It was no surprise that there were bigger problems for black women to face before they could move to the legal access of abortion. The biggest problem being the forced sterilization<sup>17</sup> of black women so as to effectively control the population of the black in the United States of America. Many authors have referred to this phenomenon as being genocidal since it was aimed to reduce and effectively control the growth of a certain ethnic population over an area and the method adopted is in clear violation of their human rights.

Poor women of color were often sterilized without their knowledge.<sup>18</sup> The claims made by the state that it was often done in order to protect the interest of the women who would otherwise impoverish in poverty and therefore, by sterilizing them the government was offering them a means to disallow them the vicious cycle of poverty was clearly refuted by the black feminists.<sup>19</sup>

They suggested that such an action on the part of the state was a clear indication that the state felt that a black woman would be incompetent to make decisions regarding her physical health as well as mental health which is why they decided

<sup>14</sup> *Roe v. Wade* (1973) 410 US 113

<sup>15</sup> Olivia Cappelo, 'Law affecting reproductive health and rights: State policy trends at midyear, 2018' (Guttmacher Institute, 31 July 2018) <<https://www.guttmacher.org/article/2018/07/laws-affecting-reproductive-health-and-rights-state-policy-trends-midyear-2018>> accessed 12 May 2019

<sup>16</sup> *Roe v. Wade* (1973) 410 US 113

<sup>17</sup> Luna Z, "Reproductive Justice and Reproductive Rights in the United States" (2016) The Wiley

Blackwell Encyclopedia of Gender and Sexuality Studies

<sup>18</sup> Olivia Cappelo, 'Law affecting reproductive health and rights: State policy trends at midyear, 2018' (Guttmacher Institute, 31 July 2018) <<https://www.guttmacher.org/article/2018/07/laws-affecting-reproductive-health-and-rights-state-policy-trends-midyear-2018>> accessed 12 May 2019

<sup>19</sup> *Ibid*

to do it on their behalf was said to be racist and abusive.

### **(C) Difference between Reproductive Rights and Reproductive Justice:**

The black feminist movement separated itself from the white feminist movement and it wanted to showcase that the most pressing issue that the white feminists dealt with being legal abortion was not the highest on agenda for every woman. They wanted to make the movement more inclusive in terms of the rights to be allowed. Women of color pushed for a more complex reproductive rights discourse: one that acknowledged that different women had varying reproductive experiences, in part, depending on their race and class position.<sup>20</sup> These particular experiences constituted the need for different demands in a reproductive rights movement.

Hence, to merely provide the right to abortion was not enough as there were women who would not have been able to access such healthcare right even in its presence due to varying factors such as not having access to legal abortion or contraception.

Women of color also believed that reproductive rights should also include the right to have children as well as the economic means to raise them in a decent environment with all necessary facilities available to them and by forcibly sterilizing the women of a particular race in order

to prevent them from having children<sup>21</sup>, this only shows that the government views them as being incompetent in deciding for themselves and allowing them a chance at parenthood due to the difference in their race and economic class than the rest of the women in the country.

The black feminists therefore argued that the mainstream movement had failed to recognize the rights of the women from marginalized sections of the society<sup>22</sup> who could not benefit from the upliftment of the ban on abortion as they had much more crucial problems to deal with. Therefore, such differences in the thinking led to a completely new movement being formed by the black feminists that not only dealt with the issue of the legal access to abortion but also various means of achieving it along the way be it through economic upliftment of black women or by means of change in the social structure of the society to enable black women to assert their rights as fiercely as the white feminist movement allowed white women to do.

Depending on their feminist framework, feminist groups had very different perspectives on the meaning of abortion and reproductive rights. The biggest hindrance that a woman from a lower strata of the society faced was that she was not capable of achieving bodily autonomy due to various economic reasons. Although abortion was legalized in the country<sup>23</sup>, many women

<sup>20</sup> UNCHR 'General Comment 18' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1994) UN Doc HRI/GEN/1/Rev.1

<sup>21</sup> Veronica Stracqualursi, 'ACLU, Planned Parenthood bring lawsuit against Alabama abortion law' (CNN Politics, 24 May 2019) <<https://edition.cnn.com/2019/05/24/politics/alabam>

a-abortion-ban-aclu-lawsuit/index.html> accessed 4 June 2019

<sup>22</sup> *Ibid*

<sup>23</sup> Luna Z, "Reproductive Justice and Reproductive Rights in the United States" (2016) The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies

were still unable to access it due to their limited resources.

After the Hyde Amendment which caused a huge uproar in the United States, the women from poorer background lost a significant chance to opt for abortions unless dire consequences were resulting from such pregnancies such as complications to the mother's life leading to her death if the pregnancy was carried full term or in certain cases wherein the pregnancy had been a result of federal offences such as rape or incest. In all the other cases abortion remained an unavailable choice for women.

The Hyde Amendment<sup>24</sup> was a legislation provision that regulated the use of state fund to provide for abortion facility to women. The abortion was only allowed to be carried out using state fund if it fell into the aforementioned three categories i.e., in case the woman's life was in danger due to pregnancy related complications or in case the pregnancy was a result of either of the two; rape or incest.<sup>25</sup> Except for all such scenarios, the government was not liable to pay for the expenses of the abortion that was to be carried out. This restricts the use of funds allocated for the Department of Health & Human Services and consequently has significant effects involving Medicaid recipients.

This amendment was passed in the year 1976 on September 30<sup>th</sup>. This measure was a clear indication of the pro-life stand that the then government of United States took in order to control abortions in the country.

---

<sup>24</sup> Luna Z, "Reproductive Justice and Reproductive Rights in the United States" (2016) The Wiley Blackwell Encyclopedia of Gender and Sexuality

The argument in favor of such an amendment was that the taxpayers who did not favor the act of abortion should not be made to pay for it through their money as the government fund is ultimately the taxpayer's money that the government receives through means of tax.

It furthered the argument that the Hyde Amendment was not unconstitutional as it did not criminalize the act of abortion therefore attacking the rights of the women at large but is simply withholding the funds that the government would be required to provide for in order to carry out the abortion. This does not constitute as being violative of the constitutional requirements and therefore, the Hyde Amendment is clearly valid. This argument was met with both assent and dissent by the people at large who were divided on this topic.

However, another group that supports the act of abortion such as organization working to provide free and fair health care facilities to poor people for example planned-parenthood protested against the application of such an amendment claiming it to be a direct attack on the rights of people who fell into the lower strata of the society economically as it was them that required the assistance of state the most to actualize their legal right of receiving free healthcare which also included free abortions since they themselves are unable to fund these treatments and if the government withdraws support for such treatments then it is a clear violation as merely

Studies

<sup>25</sup> *ibid*

providing a right is not enough if the people do not have the means to achieve those rights.

This amendment was also said to be targeted towards a certain class as it was majorly effecting low income group women disproportionately. “The Hyde Amendment restricts abortion coverage for federally-funded healthcare recipients, specifically women enrolled in Medicare and Medicaid, Native American women, US. Service women and veterans, women in Peace Corps, female federal employees, D.C. women residents, and women in immigration detention facilities and prisons.”<sup>26</sup>

## **II. LEGISLATIONS PERTAINING TO REPRODUCTIVE JUSTICE IN THE UNITED STATES OF AMERICA**

The United States of America is a federation in the truest sense of the word, which means that unlike countries like India which only have a single constitution for the entire nation, US has constitution both at the federal as well as state level. Therefore, each of its 50 states has the power to govern itself by means of a self-established constitution that could be in contrast with the laws enshrined in the federal constitution and in a number of scenarios, the state law might prevail over the federal law.

However, this poses a serious problem as there are going to be situations that have conflicting law at both state and federal laws and the application of a certain law will be in question. For example, in the case of abortion laws, various

states have different laws than the federal law in place. This causes a differential treatment amongst people. Women in one state will therefore be more prone and vulnerable in a state than has anti-abortion laws in place as compared to women who reside in states that guarantee abortion and other reproductive rights to women.

### **(A) Federal Laws in America:**

The federal law pertaining to abortion in the United States of America began shaping extensively after the Roe v. Wade judgment of 1973 that held the right of a woman to decide whether or not to carry out a full term pregnancy as being paramount and therefore will be read with the fourteenth amendment of the US Constitution which provides the right to privacy hence allowing the woman to make a choice whether or not to have an abortion. Although the right may seem absolute, however in reality it is not so.

The case divided the pregnancy into three parts wherein the government played different roles in all the different trimesters of pregnancy. The first trimester allowed full autonomy to the woman to go ahead with an abortion in case of an unwanted pregnancy and the government had no role to play in it. The second trimester will allow the government certain powers to regulate the abortion laws in case there are reasonable health factors involved whereas in the third case, the government could completely disallow the abortion barring cases that require the process of

<sup>26</sup> Organization of American States, ‘Legal Situation of Refugees, Returnees and Displaced Persons in the American Hemisphere’ General Assembly Res

AG/Res 1214 (XXIII-O/93) (Washington DC 11 June 1993)

abortion in case the mother's health or life is at significant risk.

Roe v. Wade is considered to be a landmark judgment that fuelled the debate of whether and to what extent can abortion rights be allowed to women. It got the ball rolling in the coming years and a series of various judgment were then decided in order to further extend the rights of a woman in a given situation.

One such case is the Planned Parenthood v. Casey judgment which was decided in the year 1992. The case challenged the provisions of the Pennsylvania Abortion Control Act of 1982. This act was put into place to regulate the act of abortion amongst females by providing for certain requirements to be met before the woman could opt for the abortion procedure. The five main provisions that were under challenge were as follows:

- Informed consent
- Spousal notice
- Parental consent
- Medical Emergency
- Reporting requirements

These provisions were to be fulfilled in order for a woman to become eligible to abort her child. The provision for informed consent meant that the medical practitioner who is about to perform the procedure is required to take the informed consent of the woman 24 hours prior to the procedure.

The word informed procedure would include not just her wilfulness to proceed with the procedure but she should be agreeable to do this even when the practitioner has informed her of all the

possible detriments attached to the procedure and in case the procedure might affect her future chances of becoming pregnant. If she agrees to go ahead with such information, then the practitioner is allowed to perform the abortion on the woman.

Another requirement is the spousal notice to be adhered to which translates into the spouse being given a prior notice of such an abortion taking place in case the woman is married. This was said to have been put in place in order to allow men who want children to have a say in the whole process. However, the critiques of this provisions came heavily upon the act stating that allowing such a provision takes away from the bodily autonomy of the female that is the core of the abortion law jurisprudence i.e., to allow women to make decisions for themselves rather than being told what to do with their own bodies by either the society or her family under different circumstances.

The third provision is similar in nature as it requires the consent of the parents in place of the spouse. This provision is applicable in case the woman is unmarried or underage. Underage pregnancies are looked at very differently in the society and these young mothers are often treated as children who cannot decide what is right or wrong for themselves. The requirement of parental consent too disallows the woman to exercise autonomy over her own body by means of obtaining consent for the procedure from at least one of the parents of the minor. In case the consent cannot be obtained due to any reason, the law allowed for the minor to obtain judicial bypass.

### III. THE INDIAN CONTEXT OF LAWS:

Interestingly, in the Indian context debates centered on the right to abort have been largely nonexistent. What may be mistaken as societal apathy sprouts from the fact that activist groups can find little fault with the Indian State's tolerant policy towards abortion. The general prohibition against abortion under the Indian Penal Code has an exception in the form of the M.T.P. Act and the grounds on which the latter permits abortion are widely worded. Pro-abortion campaign in America was sparked off by an unfavourable State policy towards abortion.

A campaign against abortion laws was never the key agenda for feminist or other activist groups in India since the Indian State has been in favour of abortion due to its demographic concerns. It must be noted that as far as the judicial attitude is concerned many facets of reproductive rights such as surrogacy or involuntary sterilization that have captured attention in the U.S. are yet to be debated in Indian courtrooms. However, the attitude of the Indian judiciary to the right to reproductive choices may be gleaned from decisions that have dealt with issues such as abortion in divorce cases.

The question that has been posed before Indian Courts most often is Whether abortion without spousal consent amounts to cruelty is a question that has been posed before Indian Courts most often and, which was recognized as such by the Punjab and Haryana High Court decision in the case of *Satya v. Siri Ram*.<sup>27</sup> This case is a fitting

illustration, wherein the Court held that the termination of pregnancy without the husband's consent where he had a "legitimate craving to have a child" amounts to cruelty. Thus a complete disregard of the pregnant woman's right to privacy, and her right to make independent reproductive choices is revealed in the attitude of the Indian judiciary.

On the other hand, the U.S. judiciary has been sensitive to the fact that pregnancy has a strong impact on a woman's health and lifestyle, and that the effects of pregnancy are borne by the woman alone. In Indian decisions such discussions that touch upon the issue of reproductive autonomy is entirely missing.

Hence, the judicial attitudes towards the reproductive rights of women in India and the U.S. have sharp contrast between them. Under abortion statutes, spousal or parental consent as a requirement for abortion has been the subject of much controversy and debate in the U.S. The U.S. Supreme Court in a series of cases in the late seventies invalidated laws requiring parental consent for abortion by minors. The reasoning behind these decisions are that the Constitution makes no distinction between persons in the conferment of rights.<sup>28</sup>

Hence, for making an arbitrary distinction between minors and adults in recognizing the right to abortion there are no justifications. That the State has a "broader authority" to regulate the activities of children have been recognized by the U.S. Courts. A statute providing for mandatory

---

<sup>27</sup> *Satya v Siri Ram*, AIR 1983 PH 252  
<[https://www.bloomberg.com/news/articles/2019-05-29/why-alabama-s-abortion-law-includes-an-](https://www.bloomberg.com/news/articles/2019-05-29/why-alabama-s-abortion-law-includes-an-exemption-for-infertility)

exemption-for-infertility> accessed 3 June 2019  
<sup>28</sup> *Planned parenthood v. Casey* (1992) 505 US 833

parental consent has been suggested which would pass judicial scrutiny if it provided for an alternate means of authorizing an abortion. The U. S. Supreme Court in recent cases has abandoned its liberal view towards the requirement of parental consent by upholding laws requiring such consent for abortion.

Balancing of the woman's right to privacy and personal autonomy and the spouse's interests in the life of the unborn child is an issue involved in spousal consent. Since the effects of pregnancy on lifestyle and health are borne by the woman alone, the decision to abort or not should be exclusively hers only as per the liberal view. Since the repercussions of the decision operate exclusively on the woman therefore man as a mere onlooker cannot enforce his choice upon the woman in such cases.

Since both spouses contribute to conception, as per a contrary view the ultimate decision regarding abortion should involve the consent of both individuals. The former view has consistently been adopted by the U.S. Courts, even going to the extent of invalidating laws requiring spousal notification prior to abortion.<sup>29</sup>

The U.S. courts have been overtly zealous in seeking to protect the woman's right to abort as per the author. Conferring a veto power to decide on abortion, on a person other than the pregnant woman is distinctly different from mere spousal

notification prior to the abortion. By affording the husband an opportunity to influence the woman's final reproductive decision, such a requirement merely recognizes the husband's legitimate interest in participating in reproductive choices.<sup>30</sup>

By failing to accord any importance to the husband's legitimate interests in procreation within marriage, and in the potential life of his unborn child the U.S. judiciary has erred. In conclusion there is a long way to go before U.S. courts can be said to have truly achieved the perfect balance between a pregnant woman's right to personal autonomy and privacy and her spouse's interests in procreation.

The M.T.P. Act, which lays down the grounds under which an abortion may be legally performed in India, does not require that spousal consent be obtained before abortion. However, the pregnancy of a minor woman cannot be terminated without the written consent of her guardian<sup>31</sup> as per section 3(4)(a) of the M.T.P. Act. Save as otherwise provided in Clause (a), No pregnancy shall be terminated except with the consent of the pregnant woman as per Clause (b) of the same provision.<sup>32</sup> It appears that that the statute permits at first glance the consent of a minor woman to be dispensed with, if an abortion is to be performed on her.

---

<sup>29</sup> *Ibid*

<sup>30</sup> Margaret Newkirk, 'Why Alabama's Abortion Law Includes an Exemption for Infertility' (Bloomberg Businessweek, 29 May 2019) <<https://www.bloomberg.com/news/articles/2019-05-29/why-alabama-s-abortion-law-includes-an-exemption-for-infertility>> accessed 3 June 2019

<sup>31</sup> Rachel K. Jones, Jenna Jerman, 'Abortion incidence and service availability in the United States, 2011' (Guttmacher Institute, 1 March 2014) <[https://www.guttmacher.org/sites/default/files/article\\_files/abortion\\_incidence\\_in\\_the\\_united\\_states\\_2011.pdf](https://www.guttmacher.org/sites/default/files/article_files/abortion_incidence_in_the_united_states_2011.pdf)> accessed 30 April 2019.

<sup>32</sup> *Ibid*

It may be noted, however, that this opinion may not hold good in a patriarchal society such as India. The requirement of spousal notification in the Indian context could conceivably result in coercive decision making, with the woman being denied any say in the matter of Reproductive Rights as long as her guardian's written permission is available. As discussed, in U.S. Courts statutes with similar provisions have been invalidated.<sup>33</sup> No challenge has been posed to the constitutionality of such a requirement in India unlike the US. However, in a 1993 decision of the Madras High Court the requirement of parental consent has been discussed.

The Court taking a unique liberal attitude towards reproductive rights, in its judgment held that section 3<sup>34</sup> does not imply that a pregnant minor's consent is dispensable in making a decision to abort. While parental consent is a pre-requisite for an abortion to be performed on a minor, it was held that it cannot be a substitute for the minor's personal consent.

This interpretation was necessary in order to accord some meaning to a minor's right to reproductive choices even though it runs contrary to the plain reading of the provision.

#### IV. CONCLUSION AND SUGGESTIONS

It can be depressing to think about the barriers to reproductive justice, the backlash against the gains of the women's rights movements, the failure of governmental authorities to enforce

laws that guarantee women's rights, and the entrenched traditions and political views that encourage politicians to deny funding for women's reproductive health and to enact laws designed to close clinics that provide necessary services. The Guttmacher<sup>35</sup> Institute estimates that sixty percent of American women live in states with legislatures that are openly hostile toward women's reproductive rights, 168 and it sometimes seems that their hostility grows stronger every day.<sup>36</sup>

Reproductive Justice in the light of the new era has been necessary to translate into reality because it is not only the woman who will be a victim in this case but the family as large as a woman is the building block of a family and her mental and physical health is very likely to effect the well-being of those around her.

The ability of women to control their fertility and to protect themselves from sexually transmissible infections (STIs) depends upon their ability to access and use contraceptives. This becomes highly imperative as the growth of STIs amongst women has been attributed as being a major cause for increase in the death tolls amongst them or increase in the maternity related morbidity amongst women in the low income group of certain countries.

"The right of individuals and couples to determine freely and responsibly the number, timing and spacing of their children and to have the information and means to do so is a basic

<sup>33</sup> Planned parenthood v. Casey (1992) 505 US 833

<sup>34</sup> *Ibid*

<sup>35</sup> Olivia Cappelo, 'Law affecting reproductive health and rights: State policy trends at midyear, 2018' (Guttmacher Institute, 31 July 2018)

<<https://www.guttmacher.org/article/2018/07/laws-affecting-reproductive-health-and-rights-state-policy-trends-midyear-2018>> accessed 12 May 2019.

<sup>36</sup> *Ibid*

human right. This principle has been affirmed in numerous international consensus documents and has been given legal force in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>37</sup>

This right gives rise to a governmental duty to ensure that men and women have equal access to a full range of contraceptive choices and reproductive health services and information. This right constitutes the core of reproductive rights, which also include the right to make decisions regarding reproduction free of discrimination, coercion and violence.

The government in such regions are expected to take certain steps for the promotion of such rights:

1. recognition given to the couple to decide for themselves the means and methods that they would like to adopt to reproduce without being subject to any kind of external force into the process of family planning that might end up being extremely disadvantageous to them.

2. government should take steps in order to establish commissions that look into the matter of presence of discriminatory laws against women and to make them more financial and socially independent so that they are not manipulated or forced into carrying any children

3. establish a family planning policy that is more inclusive in nature and that creates laws and legal remedies for the marginalized groups such as the refugees, internally displaced women, migrant workers, commercial sex workers etc.

4. an expansion of the choices of contraceptives available in the market to curb the unwanted pregnancies in the country. There should not be a limitation for only women to have the contraceptive options available rather there should be allocation of funds to develop different kinds of male contraceptives that can ensure the involvement of men in the process of safe and planned parenting for both the parents instead of just putting the burden on a single sex.

Introduction of treatment for couples that are unable to conceive children in the public health care systems as it is an integral part of a healthy family and hence should be included in the family planning scheme for efficient planning of such families.

\*\*\*\*\*

---

<sup>37</sup> Convention on Discrimination Against Women, 1979