"WHY DO YOU CARE ABOUT MY BODY?"- AN ANALYSIS OF ABORTION LAWS IN THE USA AND INDIA

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Abstract

In May 2019, the State of Alabama passed an anti-abortion law imposing almost a complete ban on abortions across the State. States in the USA are shifting towards the conservative ideology concerning abortion laws in the country. The Alabama law makes no exception for rape and incest, thus being considered to be the most severe and inflexible ban on abortion in history. The autonomy of a woman to have a child or not is completely disregarded. However, this law is against the federal law of the USA, based on the landmark decision of Roe v. Wade. This paper examines the grounds of contravention of the two laws, the probable reasons for enacting such a draconian law and comments upon which law shall prevail and why. In addition to this, it comes up with a few changes that are required to be made to the existing legal framework. Furthermore, the abortion law in India is described with a brief overview of its

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application. The major case laws in India concerning abortion and the constitutional parameters in India related to such legislations are discussed. The 2017 judgment of Justice K.S. Puttaswamy v. Union of India has increased the threshold of bodily autonomy which attaches itself to reproductive autonomy. The authors finally attempt to explain the best approach to be adopted towards the Medical Termination of Pregnancy Act, 1971, discussing how the medical advancements and the changes in society now demand for amendment in the law.

I. INTRODUCTION

On 22nd January, 1973, every woman in the USA truly realised her dream of the 'land of the free' as the Supreme Court handed down its long awaited opinion in *Roe v. Wade* ("***Roe***"),[1] which was followed by *Doe v. Bolton* ("***Doe***").[2] The upshot of the decisions was that the women of America could not be denied abortion before foetal viability. The court favoured the argument that prioritized the woman's reproductive autonomy over the protection of 'life' argument, which includes prenatal life as well.[3] Consequently, infringement of that right by the government should pass strict judicial scrutiny.[4] The American courts apply the 'strict scrutiny test' when a fundamental constitutional right is infringed, particularly

[1]Roe v. Wade, 410 U.S. 113, 133 (1973).
[2]Doe v. Bolton, 410 U.S. 179 (1973).
[3]Roe, *supra* note 1.
[4]United States v. Carolene Products Company, 323 U.S. 18, 21 (1944).

those contained in the Bill of Rights or those the court has deemed a fundamental right.[5] Under this test, the impugned statute shall be pronounced unconstitutional unless it is 'necessary' or 'narrowly tailored' to serve a 'compelling' government's interest.[6] However, these judgments did not come overnight and must be read in light of their background, discussed hereafter.

II. FEDERAL LAW OF THE USA REGARDING ABORTION

The first anti-abortion legislation in the USA was enacted by the State of Connecticut in 1821.[7] New York's (the first State to include an exception)[8] legislation on the subject stood out for its exception that it was not illegal to proceed with abortion if the mother's life is in danger.[9] Colorado and New Mexico included a 'serious or permanent bodily injury' exception.[10] The beginning of change in the federal law came with the Model Penal Code in 1960. This Code's provisions decriminalized abortions in cases where there was a threat to the life of the mother, or where the child resulting from such a pregnancy would be deformed, or the pregnancy had resulted from rape or incest.[11] There were diverse judicial opinions on this point, which exist till date. Such legislations led to the slow and steady development of questions regarding bodily autonomy of a woman. The California Supreme Court in 1969 accepted that a woman's right

[5]*Id.*
[6]Johnson v. California, 543 U.S. 499, 505 (2005); Miller v. Johnson, 515 U.S. 900, 920 (1995);Richard H. Jr. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).
[7]CONN. STAT. tit.20, § 14 (1821).
[8]N.Y. Rev. Stat. (1829), Pt. IV, Ch. 1, tit. 6, § 21.
[9]*Id.*
[10]Edward Veitch& R.R.S. Tracey, *Abortion in the Common Law World*, 22 AM. J. COMP. L. 652, 663-64 (1974).
[11]American Law Institute, Model Penal Code, s. 230.3 (1962).

to abortion was an absolute one.[12] It was followed by the courts in Wisconsin[13]and New Jersey.[14] This idea was not uniform, it found detractors in the courts of Ohio and Louisiana, which held that the woman's right to abortion was in no way superior to the unborn child's right to life.[15]The presumption that the collective conscience of the people did not allow a woman to abort her foetus led to the decision by the Federal Court in 1970 that the woman had no right to choose abortion.[16] This was, however, outdistanced by legislatures of Hawaii,[17] New York[18] and Washington[19] which enacted legislations granting abortions on demand. Slowly, there was a growing acceptance of the constitutional right to privacy, which respects reproductive autonomy.

Apart from the legal events, there were some social events too which led to the change in the attitude of people. In the years 1964 and 1965, a rubella epidemic resulted in the births of some 30,000 deformed children; 100 were partly due to the restrictive abortion statutes in the majority of the States at the time.[20]

Then, finally, in 1973, two very important judgments were delivered. In *Roe*,[21] a Texas statute, which forbade all abortions except the ones necessary to save the life of the mother, was challenged. In *Doe*,[22] the Georgia legislation was the impugned legislation, which mandated the abortion be performed only in accredited hospitals. In addition to this,

[12]People v. Belous, 71 Cal. 2d 954, 458 P.2d 194 (1969).
[13]Babbitz v. McCann, 310 F. Supp. 293 (1970).
[14]YWCA v. Kugler, 342 F. Supp. 1048 (1972).
[15]Edward Veitch, *supra*note 10 at 664-665.
[16]Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (1970).
[17]Hawaii Rev. Stat. § 453-16 (a) (3) (Supp. 1972).
[18]New York Penal Law § 125.05.3 (McKinney Supp. 1972).
[19]Washington Rev. Code Ann. § 9.02.060 (Supp. 1971).
[20]Quay, *"Justifiable Abortion-Medical and Legal Foundations,"* 49 GEO.L.J. 173, 238-41 (1960).
[21]Roe, *supra* note 1.
[22]Doe, *supra* note 2.

two physicians had to confirm the opinion of the surgeon, followed by confirmation from the hospital abortion committee. The Supreme Court of the USA struck down both the legislations which infringed the woman's fundamental right to choose whether or not to terminate her pregnancy and gave a test which is widely known as the 'trimester test'. The Texas statute was struck down on the ground that it was overly broad in its language and in this way, discouraged abortions[23] and the Georgia legislation was struck down because the requirements were unreasonable and posed to be restrictions.[24] The judges accepted the autonomy arguments supported by the Fourteenth Amendment's concept of personal liberty[25]but also balanced it with the State's compelling interest in the foetus.[26]It was held that the State's interest in the health of the mother and the potential human being may be sufficiently compelling to demand that the woman's right be less than absolute during the later stages of the pregnancy.[27] The court decided that:[28]

- in the first trimester (1 to 12 weeks), solely the woman has the right to terminate, in consultation with her doctor;
- in the second trimester (13 to 28 weeks), the State can make regulations to protect the maternal life; and
- in the third trimester (28 weeks onwards), when the foetus is viable, the State can regulate or even prohibit abortion except when it is necessary for the protection of the mother's life or health.

[23]*Roe*, *supra* note 1.
[24]*Doe*, *supra* note 2.
[25]*Roe*, *supra* note 1.
[26]*Roe*, *supra* note 1.
[27]*Roe*, *supra* note 1.
[28]Kerry Petersen, *Abortion Laws: Comparative and Feminist Perspectives in Australia, England and the United States*, 2 MED. L. INT'L 77, 92 (1996).

The court refused to accept that the foetus is a person within the meaning of the Fourteenth Amendment and other sections of the Constitution but recognized that the state has an important interest in protecting the potential human life. This interest becomes compelling at the end of the second trimester,[29] as it endangers the mother's life.[30] Since medicalization of abortion was a crucial element of the reasoning, Justice Blackmun, while suggesting that the woman's right to abortion is qualified not only by state interests but also by clinical autonomy, said that the holding in Roe:[31]

"Vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with physician" (emphasis supplied).

The fundamental right to abortion as recognized in *Roe* has been upheld in many subsequent cases.[32] However, the courts have restricted access to abortion by amending the nature of state regulation. *Webster v. Reproductive Health Services* and *Planned Parenthood of South-Eastern Pennsylvania v. Casey* were the two cases where the court reviewed restrictive statutes which went to the essence of *Roe*: the trimester construction and viability.[33] In the 1989 Webster decision, the court upheld a Missouri statute that prohibited

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[29]Roe, *supra* note 1 at 128.

[30]Jody Steinauer et al., *Second Trimester Abortion,* PRACTICE BULLETIN OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS (June 2013), https://www.acog.org/Clinical-Guidance-and-Publications/Practice-Bulletins/Committee-on-Practice-Bulletins-Gynecology/Second-Trimester-Abortion?IsMobileSet=false.

[31]Kerry Petersen, *supra* note 28 at 93.

[32]Stenberg v. Carhart, 530 U.S. 914 (2000); Whole Woman's Health v. Hellersted, 136 S. Ct. 2292 (2016).

[33]Webster v. Reproductive Health Services, 492 US 490 (1989); Planned Parenthood of Southeastern Pennsylvania v. Casey, 120 L. ed 2nd 674 (1992).

the use of public facilities and public personnel to perform abortions.[34] The Supreme Court upheld a foetal-viability regulation which required physicians to test for foetal viability if they believed a woman seeking an abortion was at least 20 weeks pregnant and the regulation was upheld on the ground that it furthered the state's interest in protecting potential life.[35] The plurality viewed the trimester construction as rigid and unsound in principle; and unworkable in practice.[36] Striking down that part of the *Roe* ruling they stated that they did not agree that the state's interest in human life should come into existence only at viability.[37] Three years later, in *Casey*, the court reemphasized that the right to an abortion is a part of the constitutionally protected right to privacy, but simultaneously upheld a state's ability to pass restrictive abortion laws, shifting the standard of review of laws restricting abortion from strict scrutiny to 'unduly burdensome'. *Casey* upheld the Pennsylvania statute that required:

- physicians to show anti-abortion materials to patients, including pictures of fetuses, to discourage the patient from having an abortion;
- a mandatory twenty-four- hour waiting period after the materials are viewed;
- the filing of detailed reports on any abortions performed with public funds, including the name and address of the facility to be made available in public records; and
- a one parent consent requirement, with a judicial by-pass.[38]

[34]Webster v. Reproductive Health Services, 492 U.S. 490, 510-11 (1989).
[35]*Id.*
[36]*Id.*
[37]*Id.*
[38]Planned Parenthood, *supra* note 33.

III. THE OVERBREADTH IN STATES

The State laws in the USA, which have to align with the federal law, vary from very restrictive to very liberal as far as abortion is concerned. Recently, nine States in the USA enacted strict abortion laws. The strictest law has been passed by the State of Alabama which shall be discussed in detail in the next section. The Governor of Mississippi recently signed a bill which prohibits abortion when a foetal heartbeat can be detected.[39] The law makes exceptions if a pregnancy threatens a woman's life or one of her major bodily functions but does not make exceptions for cases of rape or incest.[40] It also says a physician who performs an abortion after a foetal heartbeat is found could have his or her state medical license revoked.[41] Such bills are called 'Foetal Heartbeat' bills.[42] Similar bills were signed in Georgia[43]and Louisiana.[44] Georgia's bill even talked about alimony, child support and income tax deductions for foetuses, declaring that "*the full value of a child begins at the point when a detectable human heartbeat exists*".[45]

Utah has an extreme example of outright opposition to abortion which is its recent act.[46]The Utah law lays down that denying abortion decision is for the woman concerned and her physician along with

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[39]Miss.B.2116, Leg.http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMTlcbm90ZGVhZFxoYW1cYW1lbmRtZW50X3JlcG9ydF9mb3Jfc2IyMTE2LnBkZg==/amendment_report_for_sb2116.pdf#xml=http://10.240.72.35/isysquery/irlc595/1/hilite.

[40]*Id.*

[41]*Id.*

[42]K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html.

[43]Living Infants Fairness and Equality (LIFE) Act, H.B. 481, 154th Gen. Assemb., Reg. Sess. (GA. 2019) http://www.legis.ga.gov/Legislation/20192020/187013.pdf.

[44]S.B. 184, H.R., http://senate.la.gov/senators/senpage.asp?SenID=38.

[45]Living Infants Fairness and Equality (LIFE) Act, H.B. 481, 154th Gen. Assemb., Reg. Sess. (GA. 2019) http://www.legis.ga.gov/Legislation/20192020/187013.pdf.

[46]UTAH CODE Ann. tit. 76, ch. 7, § 302(3)-319.

various consent requirements including that of the father of the unborn child.[47] Another provision mandated that the abortion decision be made only after a judicial hearing and interested parties were granted right to present their views-the father, the paternal grandparents of the foetus, the mother's parents (if she was unmarried) and the county attorney.[48] The act contained many such restrictive provisions, very few of which were declared unconstitutional by the court in *Doe v. Rampton*[49]and many of which still stand.

On the contrary, many States including Florida, Nevada, California, etc. have liberal laws related to abortion.[50] The New York State Assembly in January of2019 enacted the Reproductive Health Act, 2019 which allows a health care practitioner who is licensed, certified, or authorized under title eight of the education law, acting within his or her lawful scope of practice, to perform an abortion.[51] It considers abortion as a part of reproductive healthcare and allows women to make the appropriate health care decision based on the medical circumstances.[52] It removes, *inter alia*, abortion from the State's criminal code and moves it into the realm of public health, as well as legalizes abortions after 24 weeks if the mother's life is in danger or the foetus is not viable.[53] Thus, making it one of the most liberal abortion laws. Another state under this is Virginia which recently removed abortion restrictions such as the 24-hour waiting period undergo counselling before having an abortion, and a mandate that required women in their second-trimester to have abortions in a

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[47]UTAH CODE, § 304.
[48]UTAH CODE, § 305.
[49]Doe v. Rampton, 366 F. Supp. 189 (1973).
[50]K.K. Rebecca, *supra* note 42.
[51]Reproductive Health Act, 2019, (N.Y. 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00021&term=2019&Text=Y
[52]*Id.*
[53]*Id.*

hospital. Besides, the bill changed the law which required people seeking an abortion to be evaluated by three doctors to confirm that the pregnancy is life-threatening before an abortion is permitted.[54]

IV. ALABAMA – REPRODUCTIVE AUTONOMY OR COMPELLING STATE INTEREST?

The Republican controlled State of Alabama on 14th May 2019 passed a near total abortion ban legislation. Following this event, the state of Louisiana also passed an anti-abortion legislation after a fort-night.[55] A total of seven States, viz Alabama, Georgia, Kentucky, Louisiana, Mississippi, Ohio, Missouri have banned abortion in the first trimester.[56] Out of these, Alabama has the most uncompromising and illiberal ban.

The State introduced an abortion ban in 1975, which was against the standards provided in *Roe*. Section 13A-13-7, Code of Alabama, 1975[57] says –

"*Any person who wilfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than $100.00 nor more than $1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.*"

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[54]H.B. 2491 Gen. Assemb. (VA. 2019), https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2491+pdf.
[55]*Louisiana passes law banning abortions after heartbeat is detected*, BBC (May 31, 2019), https://www.bbc.com/news/world-us-canada-48468962.
[56]K.K. Rebecca Lai, *supra* note 42.
[57]ALA. CODE § 13A-13-7 (1975).

The rationale for this section lies in the same legislation, which for homicide considers an unborn child as a person regardless of its viability.[58] This has been the stand of the State and to further strengthen this stand and challenge the constitutional validity of *Roe*, the legislation in question, viz, Alabama Human Life Protection Act (AHLPA),[59] was passed.

A. An overview of the AHLPA

i) The act provides that it is unlawful to intentionally perform abortion[60] and gives three ingredients of abortion –

- Use or prescription of any substance or device;
- Intent to terminate pregnancy;
- With the knowledge that the termination in reasonable likelihood would kill the unborn child.[61]

ii) There a few exceptions in relation with unborn child, if the act was done –

- with the intention to save life of unborn child, remove dead child.
- to avoid health risk to mother due to premature delivery.
- because child had lethal anomaly.
- because of ectopic pregnancy.[62]

iii) Exceptions in relation with the mother,[63] if –

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[58] ALA. CODE § 13A-6-1 (1975).
[59] Alabama Human Life Protection Act, § 1 https://legiscan.com/AL/text/HB314/id/2018876.
[60] *Id.,* § 4(a).
[61] *Id.,* § 3(1).
[62] *Id.*
[63] *Id.,* § 3(6).

- the condition is such that mother's life is at risk.[64]
- two physicians, one being a psychiatrist, specify that mother is suffering from mental illness that may result in her or unborn child's death.

iv) For the act, a person is a human being including unborn child regardless of viability[65] and woman means a female human being notwithstanding her age.[66]

v) If abortion is performed or attempted to be performed in violation of this act it is a class A and class C felony respectively.[67]

vi) Section 8 of the act is a non-obstante clause, which provides that any law in contravention of this act shall be repealed as null and void.[68]

B. Why such a draconian law

i) The State of Alabama came up with various reasons for enacting the legislation. The lawmakers have dedicated an entire section to 'legislative findings'.[69] From a bare perusal of the said section, one can easily argue that these findings are nothing but the reasons for enacting the law. A few findings worth mentioning are-

- The state claims to recognize the rights and sanctity of the unborn child, thereby does not recognize the right to abortion. Alabama passed a constitutional amendment on 6th November 2018 to achieve this aim. In an aim to

[64] *Id.*, § 3(6) and 4(b).
[65] *Id.*, § 3(7).
[66] *Id.*, § 3(8).
[67] *Id.*, § 6.
[68] *Id.*, § 8.
[69] *Id.*, § 2.

recognize unborn child's rights they have completely disregarded mother's rights, beyond all proportionality.

- The rationale behind imposing ban even in the first trimester is that the heart starts to beat around 6 weeks, i.e., in the first trimester and fetal photography shows a clear development of a human being. It relies on the United State Declaration of Independence and implies that all human beings are equal *'from creation'*.

- The lawmakers disagree with the decision in *Roe*, and do not recognize abortion rights. *Pro*, the lawmakers believe that *Roe* has opened floodgates to litigation in the reign of so called 'abortion rights'.

ii) Another reason in the opinion of authors could be the low population of Alabama. The state has a population of around 47 Lac, it stands out of the top 20 states.[70]The change in population was less than 0.5% between 2017 and 2018.[71] If a state has a low population and the population increase is also low, society-oriented laws are made. Increase in population is required, so curbing the abortion rights might have appealed to the lawmakers. Even if this is the reason for AHLPA, the lawmakers must realize that only reasonable restrictions can be placed on rights and they cannot be

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[70]United States Census Bureau, *2018 National and State Population Estimates, Annual Population Estimates, Estimated Components of Resident Population Change, and Rates of the Components of Resident Population Change for the United States, States, and Puerto Rico: April 1, 2010 to July 1, 2018,* (December 19, 2018), https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html.

[71]United States Census Bureau, *State Population Change: 2017 to 2018*, December 19, 2018, https://www.census.gov/library/visualizations/2018/comm/population-change-2017-2018.html.

disregarded in their entirety. It must be made clear at this stage only, that this is the possible reason suggested by the authors after considering the demography of Alabama.

C. Why the law is facing criticism

i) Abortion is permitted on request in countries like, China,[72] Tunisia,[73] South Africa,[74] Singapore,[75] Hungary,[76] etc., whereas this act imposes almost a complete ban on abortion.

ii) The law provides exception only in cases of medical emergency as discussed above, but not in cases of rape and incest unlike many countries.[77] A woman should not be forced to have a child out of rape or incest, it should be left to her choice to decide whether she wants to have that child or not, it is her right to privacy.

iii) The law imposes a ban immediately after the last menstrual cycle, i.e., since week one.

iv) Apart from these general issues, the law is directly in contravention of the federal law, which lays down the general principles.

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[72]Nie, Jing-Bao,*Limits of State Intervention in Sex-Selective Abortion: The Case of China*, 12 CULTURE, HEALTH & SEXUALITY,205–219 (2010).

[73]Isam Nazer, *The Tunisian Experience in Legal Abortion,*17INT'L. J. GYNAE. OBSTET. 488-492 (1980).

[74]Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

[75]Termination of Pregnancy Act, ch. 120, 1974 (Sing.).

[76]1992. Act LXXIX. Law on the Protection of the Foetus (Act LXXIX of 1992 of the Parliament) (Hung.).

[77]*See* Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971 (India); Canada Health Act, S.C. 1984 (Can.); *Crimes (Abolition of Offence of Abortion) Act 2002* (Austl.); Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

D. The fate of Alabama Law

To understand the fate of the AHLPA, it is necessary to understand the structure of the USA federal system. Unlike India, the USA has several Constitutions. Article 4 of the Constitution of the USA contains a guarantee clause.[78] It lays down that the USA must guarantee a republican form of government to every State.[79] The federal[80] and State governments have their respective designated fields to make laws. The supremacy clause in the federal Constitution lays down that the States and their courts are bound by it.[81] In the words of Alexander Hamilton,[82]

"*A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.*"(emphasis supplied)

Another noted author James Madison connoted the importance of supremacy clause, and verbalized why the federal government shouldn't be subservient to the state Constitutions,[83]

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[78]U.S. CONST. art. 4.
[79]*Id.*
[80]*Id.,* art.1 § 8.
[81]*Id.,* art. 6.
[82]ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS, 157 (Lawrence Goldman, 1st ed. 2008).
[83]*Id.,* at 227.

"*It would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.*"

This implies that any law in contravention of the federal constitution, federal laws or decisions of the Supreme Court of the USA would be unconstitutional, thus null and void. SCOTUS has struck down state laws time and again by applying the supremacy clause, starting with *Ware v. Hylton*[84] also known as British Debt Case. One the most celebrated cases in this regard is *Marbury v. Madison*,[85] where Section 13 of the Judiciary Act of 1789 was challenged on the ground that it enlarged the Supreme Court's original jurisdiction beyond the permitted ambit. The Supreme Court held that the Congress cannot pass a legislation contrary to the Constitution. In the year 2000, Supreme Court enlarged the area of operation of supremacy clause when it went on to declare that even if the impugned law is not in direct conflict with the federal law but merely stands as an obstacle in fulfilment of full purposes or objectives of the federal law, it is liable to be struck down.[86]

To escape this, States, while enacting a law in contravention of the federal law make it inoperative, ineffective or unenforceable or in a nutshell the laws enacted are trigger laws, i.e. a statute, a substantive part of which would be held unconstitutional if challenged, but cannot be challenged as it contains a trigger provision making it ineffective until a change in constitutional law would allow them to be upheld by the courts.[87]It is a way by which the States express disapproval of the Supreme Court's interpretation of the law on abortion.[88] When the constitutional right to terminate a pregnancy was recognised in *Roe*,

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[84]Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[85]Marbury v. Madison, 5 U.S. 137, 177-179 (1803) (federal law); Fletcher v. Peck 10 U.S. (6 Cranch) 87, 139 (1810).
[86]Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000).
[87]Berns, Matt, *Trigger Laws*, 97 GEO. L.J.1639, 1641 (2009).
[88]*Id.*

many States like South Dakota treated it with hostility and many codified this reaction by enacting anti-*Roe* laws.[89]

As discussed before, the decision in *Roe* had two prongs, viz., i) a woman has the right to abortion and ii) the trimester test. This is the federal law of the US and all the other state laws must conform to the general principles of *Roe*, the supremacy clause makes this binding. The AHLPA is in direct contravention of *Roe* standards. Though there was diversion in this law in 2007 when Supreme Court handed down a 5:4 decision in *Gonzales v. Carhart*,[90] whereby it held that the Congress was well within its power to 'generally' ban abortion, but it did not overrule *Roe* or any other precedent which followed *Roe*. The decision in *Gonzales* can be questioned on the grounds of autonomy; the Ninth[91] and Fourteenth[92] Amendment read together giving a woman the right to privacy with regard to abortion. In addition to this, reading Section 1 and Section 3(8) of AHLPA together the trimester test is also absolutely disregarded in the AHLPA as it bans abortion from the first week itself. Thus, the Alabama abortion ban has no future, it is destined to be struck down.

V. THE INDIAN PERSPECTIVE

Abortion in India is governed by the Medical Termination of Pregnancy Act, 1971 ("**MTP Act**" or "**Act**").[93] It gives the medical practitioners wide discretion for deciding whether an abortion is

[89]*Id.*
[90]Gonzales v. Carhart, 550 U.S. 124 (2007).
[91]U.S. CONST. amend. IX.
[92]U.S. CONST. amend. XIV.
[93]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.

justified.[94] Such decisions are made under broad auspices of health or humanitarian reasons.[95] This 8-section long Act provides grounds for termination of pregnancy.[96] But just like the USA, in India too this position of law has a background.

Section 312[97] of the Indian Penal Code along with Code of Criminal Procedure, 1973,[98] with their origins in the British Offences Against the Person Act 1861 criminalized inducement of an abortion except when the woman's life is in danger. This provision increased the quantum of safe abortions in India.[99] Thus, the Parliament felt the need for an exhaustive dedicated legislation and enacted the MTP Act according to which abortions are no longer illegal if,[100]

i) they are performed for one of the several specified reasons;

ii) within a limited period;

iii) after conception by a specially designated specialist and under prescribed conditions.

The most important provision of the Act is Section 3[101] which states that a pregnancy can be terminated on two grounds-

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[94]Vineet Chander, *"It's (Still) a Boy...": Making the Pre-Natal Diagnostic Techniques Act an Effective Weapon in India's Struggle to Stamp Out Female Feticide*, 36 GEO. WASH. INT'L L. REV. 453, 453, 457 (2004).
[95]*Id.*
[96]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[97]PEN. CODE NO. 45 OF 1860, § 312.
[98]CODE CRIM. PROC. NO. 2 OF 1974.
[99]Saumya Maheshwari, *Reproductive Autonomy in India*, 11 NSLR 27 (2007).
[100]John M. Thomas et al., *Indian Abortion Law Revision and Population Policy: An Overview*, JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 16, No. 4, SYMPOSIUM ON POPULATION CONTROL AND THE LAW (October-December 1974), pp. 513-534.
[101]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.

"*(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or*

(ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped."

One of the most striking and progressive points about this law is that, it presumes that the anguish caused to a woman because of being raped constitutes a grave injury to the mental health of the pregnant woman.[102] Abortion can be performed only by a registered medical practitioner and when the length of pregnancy has not exceeded 12 weeks with one medical practitioner certifying the application on the above mentioned grounds or 20 weeks with two medical practitioners certifying the application on the above mentioned grounds.[103]

Registered medical practitioner, for the purposes of the Act, means a 'medical practitioner who possesses any recognized medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, (102 of 1956),[104] whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.'[105]

This position of law has been upheld by the courts in India since then. One of the most important cases is *Justice K. S. Puttaswamy v. Union of India*,[106] where the court while upholding the decision in *Suchita*

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[102]Ramalinggam Rajamanickamet al., *Termination of Pregnancy by Rape Victim: The Dilemma in Malaysian Criminal Law,* 7 INT'L. J. ENG. TECH. 159-162 (2018).
[103]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[104]Medical Council Act, 1956, No. 102 of 1956, Acts of Parliament, 1956 (India).
[105]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[106]Justice K. S. Puttaswamy (retd.) and Another v. Union of India and Others, (2017) 10 SCC 1, ¶82.

Srivastava v. Chandigarh Administration[107]provided the justification for providing limited grounds for medical termination of pregnancy. It opined that -

"*There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a `compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled.*"*(emphasis supplied)*

In another recent case,[108] the Supreme Court dismissed a civil appeal sought to identify and fortify the husband's consent to terminate a pregnancy and opined that abortion is an exclusive right for women. The Supreme Court upheld the decision of the Punjab and Haryana High Court according to which "*the husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. It is held that no express or implied consent of the husband is required for*

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[107]*Suchita Srivastava and Another v. Chandigarh Administration,* (2009) 9 SCC 1, ¶11.

[108]Ajay Kumar Pasricha v. Anil Kumar Malhotra, Review Petition No. 2939/2017.

getting the pregnancy terminated under the Act." The High Court also stated that an unwanted pregnancy would negatively affect the mental health of a woman: "*the woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to give birth to a child.*"

Even though the maximum limit within which the foetus can be aborted according to the MTP Act is 20 weeks, the courts in India have been allowing the termination beyond the limit for the well-being of the pregnant woman or when the foetus would develop serious ailments if born. The Himachal Pradesh High Court allowed abortion of a 32 weeks old foetus of a 19yearold girl having mild to moderate mental retardation on the ground that it is risky for her to complete the normal period of pregnancy and delivery of the child on the due date.[109] In another recent judgment, the Bombay High Court allowed a surrogate mother to abort her 24week foetus, as the foetus had numerous heart abnormalities and was expected to require multiple surgeries if born.[110] It was to be done with the intended parents' consent.[111] The Delhi High Court in a recent judgment allowed abortion of a 22weeks old foetus of a 16yearold rape survivor owing to the distress that she was going through and the risks the unwanted pregnancy was posing to the well-being of the petitioner.[112]

However, many courts, on the other hand, have applied the Act *strictissimi juris* like the Calcutta High Court which recently rejected a woman's petition to terminate her 26weekold pregnancy even when there was a high risk of Down Syndrome, along with problems in the

[109]Geeta Devi v. State of H.P. and others, 2017 SCC OnLine H.P. 1497 ¶6 (India).
[110]Kiran Kailas Gavhande and others v. Union of India, 2018 SCC OnLineBom 7463 ¶7.
[111]*Id.*
[112]Minor X (Through Guardian Raj Kumar) v. State (NCT) of Delhi, W.P. 12795/2018 ¶7.

oesophagus, heart and abdomen.[113] The court held that at an advanced stage like 26 weeks, the right of the foetus to live outweighs the mental trauma that may be suffered by the mother in giving birth to the child.[114] This way, this once progressive law needs to move with the time and according to medical advancements. We shall discuss why this 48-year-old Act has to be amended according to the need of the hour in the next section.

A. *Why the 48-year-law needs to be amended*

A recent case made headlines when the Madhya Pradesh High Court, following the letter of law, rejected a plea for abortion of a 12-year-old rape survivor who was above 20 weeks pregnant. The Supreme Court, in a judgment, denied a 20-year-old woman permission to terminate her over25-week pregnancy, suggesting that aborting a foetus amounted to murder. These cases are an example of cases like the Calcutta High Court judgment[115] mentioned above.

a) *Restrictive nature of the Act*

The Act, instead of recognizing a woman's right to make her own reproductive choices, gives limited restrictive grounds for terminating a pregnancy. The Supreme Court, in a judgment, denied a 20-year-old woman permission to terminate her over-25-week pregnancy, suggesting that aborting a foetus amounted to murder and the grounds provided by the woman are outside the scope of MTP. The petitioner was reportedly a victim of domestic violence and wanted to abort the child on the grounds of marital discord and desire to initiate divorce proceedings. This is where the Act needs to be amended to include abortion-on-request recognizing the woman's reproductive autonomy. Reproductive autonomy can be defined as the right of the woman to

[113]In re: Suparna Debnath v. State of W.B., AST No. 3 of 2019.
[114]*Id.*
[115]In re: Suparna Debnath v. State of W.B., AST No. 3 of 2019.

have children or not, and if so, the right to determine the number of children they want, when and with whom; and the freedom to choose the means and methods to exercise their choices regarding fertility management.[116] Whether male reproductive autonomy has a similar threshold or not still remains a question.[117]

b) *Disregard for the reproductive autonomy guaranteed under Article 21*

The Supreme Court had recognized a woman's right to reproductive choices as a part of 'personal freedom' under Article 21 in *Suchita Srivastava v. Chandigarh Admn.*[118] The principle was reiterated in another case where the court allowed a woman to abort her 24-weeks foetus because of a risk to her health.[119] The court therein observed that the woman has a right to protect and preserve her life and her exercise of that right is well within the limits of her reproductive autonomy.[120] The MTP Act does not technically allow the woman to choose abortion. Rather, the decision is left to the doctor who decides for the woman on medical grounds contained in Section 3.[121] Furthermore, a woman cannot choose to terminate her pregnancy on any ground except those mentioned in the MTP Act.

c) *Increase in the time period*

The period for abortion should be increased from 20 to 24 weeks at least- this is the standard determined by *Roe.* In addition to this, there

[116]Saumya, *supra* note 103 at 31.
[117]Preston D. Mitchum, *Male Reproductive Autonomy: Unplanned Fatherhood and the Victory of Child Support*, 7 THE MODERN AMERICAN 10, 12 (2011).
[118]*Suchita Srivastava and Another v. Chandigarh Administration,* (2009) 9 S.C.C. 1, ¶11; Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶82.
[119]Meera Santosh Pal v. Union of India (2017) 3 SCC 467, ¶12.
[120]*Id.*
[121]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament § 3, 1971.

must be a clause to permit abortion in special circumstances beyond 24 weeks and where the life of the mother is not endangered. The government also aims to increase this limit,[122] but this proposed increase is only when there is a substantial risk to the mother's health. A woman should have the right to choose whether to opt for abortion or not as reproduction choices are a part of decisional autonomy under the right to privacy.[123]Though the State can impose reasonable restrictions on this, under the MTP Act, women do not have a choice to abort the child on request until and unless her life is in danger or there exist other medical grounds. It is unreasonable to have only these two grounds for termination of pregnancy and not consider grounds like financial incapability, unwanted pregnancy due to rape, incest and so on.[124] A woman must be granted this choice, and the MTP Act must be amended accordingly to give woman decisional autonomy in this case.

d) Safeguards for single women

If a sexually active single woman gets pregnant due to contraceptive failure or any other reason, she cannot abort her child under the MTP Act because she is single and do not intend to raise the child. The Ministry of Health and Family Welfare has recommended this change in 2016, which is yet to be accepted.[125] If accepted, a woman whether married or unmarried can abort her child in case of contraceptive

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[122]Medical Termination of Pregnancy (Amendment) Bill, 2017.

[123]Justice K. S. Puttaswamy (retd.) and Another v. Union of India and Others, (2017) 10 SCC 1, ¶248.

[124]NushaibaIqbal, *Medical Termination of Pregnancy Act Failing Women Who Need It the Most*, INDIA SPEND (Oct. 22, 2019), https://www.indiaspend.com/medical-termination-of-pregnancy-act-failing-women-who-need-it-the-most/.

[125]Press Trust of India, *Health Ministry proposes allowing abortion for unmarried woman in case of contraceptive failure*, INDIAN EXPRESS(June 3, 2019), https://indianexpress.com/article/india/health-ministry-proposes-allowing-abortion-for-unmarried-woman-in-case-of-contraceptive-failure-4423698/.

failure. *In vicem*, the law should be made to grant every woman decisional autonomy,[126] irrespective of her marital status.

VI. CONCLUSION

"*Roe v. Wade was not the beginning of abortions for women, it was the end of woman dying from abortions.*" -Jan Schakowsky.

The position of the federal law in the USA is extremely balanced; it achieves a nexus between the deprivation of right and the aim of the law, which is the basic rationale behind the principle of proportionality. This law should be applied in individual States mutatis mutandis, without contravening the general principles of the federal law. The law laid down in Roe can even be applied *sicut est* by the States. There is a growing tendency among States to impose disproportionate restrictions which directly and explicitly contravene the federal law. It is for the courts to interpret the rights of an individual, balance it with State aim and adopt the best society-oriented approach. The Alabama law is among the most unbending laws regarding abortion in the world. Such laws must be criticized and declared null and void; a better legislation must be passed conforming to the general principles of standard law. Any law interfering with the first trimester is unacceptable as it directly interferes with the reproductive autonomy of a woman, which is fundamental to personal liberty.

As far as the law in India is concerned, the MTP Act deserves appreciation. Considering the Indian society, the law ex tempore was ahead of the society. However, with time and medical advancements, the law requires change. There is a need to recognize reproductive autonomy and the law must go beyond the stereotypes to accept that

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[126] *See* Justice K. S. Puttaswamy, *supra* note 110.

even a single woman can be sexually active. Not giving the right to abort the unborn child to a single woman or even a married woman on her choice is nothing but the deep-seated patriarchy in Indian society.