Reproductive rights have been at the forefront of legal discussion in the United States for many decades now. On the other hand, reproductive autonomy is yet to be fully recognized as a fundamental aspect of the right to personal liberty under the Indian Constitution. In the context of this insufficient focus on the issue of reproductive rights in India, this paper compares the Indian approach with that of the U.S., in terms of judicial attitudes and State policy. It also looks at the matter from the standpoint of legal issues concerning reproductive autonomy, such as abortion and involuntary sterilization, that are common to both countries, despite their divergent social and cultural contexts. The paper reflects how a difference in social attitudes and contexts contributes towards shaping the contours of legal issues differently in the two countries.

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IV. REPRODUCTIVE AUTONOMY: A COMPARISON OF JUDICIAL ATTITUDES IN THE U.S. AND INDIA .................................................................81

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I. INTRODUCTION

One of the key challenges in the area of civil liberties is to strike the optimum balance between individual autonomy and the equally legitimate, but often conflicting, interests of the community. Libertarianism and utilitarianism have emerged as two dominant schools of thought in response to this dilemma. As per the libertarian philosophy, personal autonomy cannot be restricted by the State except to the extent that an exercise thereof limits the liberty of other individuals. On the other hand, utilitarianism is founded on the principle that any State action should be for "the greatest good of the greatest number," and therefore gives primacy to the interests of the community at large.

The conflict between these two theories forms the basis of the debate surrounding reproductive rights, which is the issue under discussion in this paper. Indeed, examples of reproductive rights debates around the world suggest that the balancing of individual interests and conflicting community interests is the focal point of most concerns surrounding this discussion. The abortion debate in the U.S. for instance, boils down to a conflict between the religious beliefs of the community and the State's interests in protecting potential life on one hand, and the mother's right to reproductive autonomy on the other. Similarly, involuntary sterilization is motivated by the belief that community interests in eugenics or population control must be privileged over the individual's right to procreative choice. While the libertarian would argue that such limits violate the right to personal autonomy, the utilitarian would support such restrictions as a legitimate means of achieving maximum utility.

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3 In this paper the author understands reproductive rights as the right of a person to make all choices regarding his or her reproductive functions. This includes the right to decide when, what and how many children to have.

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In India, the debate surrounding reproductive rights has been pushed to the forefront of contemporary legal discussion following some recent developments, which reflect the same underlying jurisprudential conflict, as is seen in the context of the United States.\(^5\)

Unfortunately, the issues underlying the reproductive rights debate have not received sufficient focus by Indian courts. In contrast, debates on reproductive choices have a long history in the western world, especially in the U.S., which provides the best comparative standard for assessing the Indian situation, as opposed to other countries. This is because of the raging public debate over reproductive rights in the U.S. and its relatively advanced constitutional jurisprudence and legal argumentation on the issue. Further, the fact that Indian courts have often looked towards American constitutional jurisprudence for inspiration\(^6\) in interpreting the Indian Constitution legitimizes the comparison. An analysis of the U.S. position on reproductive rights will, therefore, help in understanding the contours of the debate surrounding this issue, both in the realm of State policy, as well as in constitutional and judicial approaches. Hence, the thrust of this paper is on a comparative analysis of the divergent attitudes of the judiciary, and of policy framers towards reproductive rights, in the U.S. and in India.

The first part of this paper seeks to identify whether, and to what extent, the Indian and American Constitutions recognize the right to reproductive autonomy. The second part addresses the distinctions in State policy towards reproductive rights in the two countries. The third part is a comparative analysis of the judicial attitudes towards reproductive rights issues in India and in the U.S. The concluding part sums up the debates on reproductive rights in the two countries and outlines the need for change in State policy and judicial perspective in each case. Only those aspects of the U.S. debate on reproductive rights have been dealt with, which are of relevance to the Indian context. For instance, the issue of surrogacy, which is not yet a substantial point of debate in India, has not been addressed in this paper.

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\(^5\) In the recent case of Javed v. State of Haryana, A.I.R. 2003 S.C. 3057 [hereinafter Javed], the Supreme Court was confronted with the question of the validity of the two-child norm, sought to be enforced at the Panchayat level in Haryana, in the interests of population control. As is the case in American legal discussion within the reproductive rights framework, the issue yet again, was the balancing of the individual's reproductive autonomy with community interests, represented by population control in this case. The Court held that the law is not violative of the right to reproductive autonomy.

II. CONSTITUTIONAL PERSPECTIVES ON PROCREATIVE CHOICES

Any reproductive choice is a decision having a direct impact and the greatest bearing, only on the concerned individual(s). 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.”

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. In the U.S., the right to privacy has achieved constitutional status on the ground that it is one of the elements of “liberty” protected by the Due Process Clause. U.S. courts have interpreted the right broadly and have extended it to cover numerous other rights. After the Supreme Court’s decision in *Griswold v. Connecticut*, it is now well settled in American constitutional jurisprudence that the right to privacy is wide enough to protect procreative choices from unreasonable State interference. In subsequent decisions, courts have invalidated requirements of parental consent, spousal consent etc., in abortion laws on the grounds of violation of the right to privacy. Thus, in contemporary times, the recognition of the right to privacy or the right to reproductive choice is no longer a subject of controversy.

Article 21 of the Indian Constitution, which is the counterpart to the Due Process Clause in the U.S., uses the term “personal liberty” instead of “liberty.” The framers of the Indian Constitution intended to narrow the protection afforded by the provision to only certain kinds of liberties related to the life and person of an individual. Nevertheless, the Supreme Court has interpreted the term “personal liberty” in a broad manner to include even the specific freedoms that

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7 *See Griswold v. Connecticut, 381 U.S. 479 (1965).* The case concerned a challenge to a Connecticut law on the grounds that it violated the right to marital privacy. The Court, in a 7-2 decision, held that although the right to privacy is not expressly protected by the U.S. Constitution, such a right can be read into the Due Process Clause of the Fourteenth Amendment.

8 *In re Quinlan, 355 A. 2d. 647 (1976); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 298 (1986); Cruzan v. Missouri Health Department, 497 U.S. 261 (1990).*

9 *Griswold, supra* note 7. In this case, the Court invalidated an 1879 Connecticut law that made the sale and possession of birth control devices a misdemeanor.


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have been granted under Article 19 of the Constitution. However, in its early decisions, such as in *Kharak Singh v. State of Punjab,* the Apex Court refused to interpret Article 21 to include the right to privacy, on the grounds that it is not expressly conferred by the Constitution. This technical view was, however, abandoned in later cases, and the right to privacy came to be recognized. In *Gobind v. State of M.P.*, Mathew, J., after borrowing liberally from U.S. jurisprudence on the point, conceptualized the right to privacy as part of the “penumbral zones” of fundamental rights. More importantly, it was laid down that for a restriction on the right to privacy to be valid, it must be imposed for the protection of a compelling State interest. Thus, very early on, a high threshold was set for restrictions on the right to privacy to be valid.

By the mid-nineties, the recognition of the right to privacy as a fundamental right was no longer contentious. Rather, the focus was on identifying the limits of the right. Following the compelling State interest test laid down in *Gobind*, the Court in *R. Rajagopal v. State of T.N.*, enumerated the limited exceptions to the right to privacy. The principle evolved by the court was that the right to privacy is lost only if public interest is involved or if the information is already within the public domain, say, in the form of public records.

The approach therefore, has been to view restrictions motivated by State interest strictly. More recently, the focus has been not on the conflict between State interests and privacy but on the clash between the right to privacy and other individual rights. Despite the right to privacy having been read into Article


13 *Kharak Singh*, supra note 6.

14 *Gobind*, supra note 6, at 1386.


17 *Id.* at 276. The Court was confronted with the issue of balancing the right to privacy with the freedom of press. The Court, in laying down the exceptions to the right to privacy, held that the Constitution does not permit the publication of matters involving the privacy of an individual's home, marriage, procreation, child bearing, education and other matters, except under certain limited conditions, for instance, where the publication is based on public records or where it is based on the discharge of official duties by a public servant.

18 See, e.g., Tokugha Yepthomi v. Apollo Hospital Enterprises, A.I.R. 1999 S.C. 495, where the Court was confronted with the clash between an individual's right to keep private his H.I.V. positive status and his fiancée's right to a healthy life, under
courts have not treated it on par with other fundamental rights.\textsuperscript{19} The broad policy of the courts has been to subordinate privacy rights, to other rights recognized expressly by the Constitution. The rationale seems to be that the right to privacy is not explicitly mentioned in the Indian Constitution. Interestingly, the Constitution does not admit of any hierarchy between fundamental rights. Therefore, once a right has been elevated to the level of a fundamental right, it cannot be considered ancillary to any other fundamental right. The constitutional jurisprudence surrounding the expansive and liberal interpretation of Article 21 also does not allow for a hierarchical ordering of fundamental rights.\textsuperscript{20} Thus, subordinating the right to privacy to other fundamental rights, merely because its origin lies in judicial interpretation, has no basis in Indian constitutional law.

Another issue of importance is that while Indian courts seem to have accepted the right to privacy as a facet of Article 21, its recognition is beset with legal difficulties. The \textit{Kharak Singh} case, which laid down that Article 21 does not

\begin{itemize}
  \item Article 21, which would be at threat if the information was kept secret, and the marriage was consummated. The Court held that the fiancé’s right to a healthy life supersedes the right to privacy. In the case of \textit{Sharda v. Dharampal}, A.I.R. 2003 S.C. 3450, the issue was whether a court directive ordering the medical examination of a spouse in divorce proceedings based on the grounds of mental unsoundness, is violative of the right to privacy. The Court formulated the dispute as a conflict between the statutory right of an individual to seek divorce on the grounds of mental unsoundness and the privacy right of the spouse directed to undergo medical examination. The Court, once again, subordinated the right to privacy holding that an adverse inference would be drawn against an individual refusing to undergo medical examination under such circumstances.

\textsuperscript{19} For instance in \textit{Gobind}, supra note 6, at 1384, the Court said:

Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution.

\textsuperscript{20} This approach is clear from the cases that have expanded the scope of Article 21 to include a number of other rights such as the right to livelihood, and the right to clean and healthy environment. In all these cases, the Court held that while the rights could be subject to restrictions like other fundamental rights, the restrictions have to conform to the conditions laid down by the Constitution, which is the protection granted to all fundamental rights. \textit{See Olga Tellis v. Bombay Municipal Corporation}, A.I.R. 1986 S.C. 180; Maneka Gandhi v. Union of India, supra note 12.

\end{itemize}
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protect the right to privacy, was delivered by a six-judge bench and is yet to be overruled by a larger bench. On the other hand, all decisions that have recognized this right, have been delivered by smaller benches. This raises questions about the legal validity of such decisions.

A review of case law pertaining to the right to privacy, reveals that barring a few exceptions, Indian courts have always viewed the right to privacy debate as a matter of deciding whether public interest trumps privacy or vice versa. In recent decisions, courts have consistently pointed out that it is subject to the larger public interest. The Indian approach is therefore, decidedly utilitarian. In contrast, the approach in American decisions on reproductive rights has been to reconcile and formulate a balance between the two interests. In the author’s understanding, one of the possible reasons for the Indian judiciary’s conservative approach is that the Indian ethos does not value an individual’s right to a private sphere to the extent that American society does. It is evident that, although Indian courts have imported the concept of the right to privacy from American constitutional jurisprudence, they are yet to imbibe the spirit behind it.

Thus, the right to privacy, from which the right to reproductive choice took root in the U.S., is yet to be fully recognized as a fundamental right in India. The hitherto unchallenged ruling in Kharak Singh, the reluctance of the courts to grant full recognition to privacy as a fundamental right, and the conservative attitude of Indian judges are the primary obstacles. These hurdles notwithstanding, the more specific question of whether the right can be extended to reproductive choices is yet to be answered by the Supreme Court. However, courts have observed that the right to privacy protects matters involving “procreation, motherhood and child-bearing.”

Further, in the recent case of Javed v. State of Haryana, the Court did not expressly reject the contention that Article 21 includes the right to reproductive choices. Instead, the Court held that regardless of how expansive an interpretation

23 See below the discussion on the innovative “trimester framework” evolved in Roe to balance competing interests of the State and the individual.
25 Javed, supra note 5.
is to be accorded to the provision, reasonable restrictions may be imposed on the exercise of such rights.\textsuperscript{26}

Thus, as per the existing understanding of the right to privacy in India, it may be concluded that there is scope for extending its protection to the realm of reproductive choices. The final determination of the question however, requires a Supreme Court decision on this specific point of law.

III. STATE POLICY AND ATTITUDES TOWARDS REPRODUCTIVE RIGHTS

A. State Policy in the U.S.

Many of the issues involving reproductive rights that have been debated at the policy level in the U.S., are yet to be addressed in India. The comparison of State policy towards reproductive rights in the two countries would be most fair and effective from the standpoint of abortion, since this is an issue that has been widely discussed in both countries.

To begin with, the U.S. permitted abortion with the consent of the pregnant woman, at all stages prior to “quickening.”\textsuperscript{27} By the beginning of the American Civil War, however, a strong anti-abortion campaign took root. At the forefront of the protests were Christian lobbyists arguing that life begins at conception. In what can be seen as a blurring of the traditional separation between the Church and the State, nearly all States had passed laws banning abortion, by 1965.\textsuperscript{28}

Thus, the history of abortion law in the U.S. suggests that State intervention has been motivated primarily by the lobbying of strong religious groups. States have also intervened on the grounds of health concerns, that is, the understanding

\textsuperscript{26} In the words of the Court:

The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights.

\textit{Id.} at 3067.

\textsuperscript{27} Quickening is the earliest perception of foetal movement by a mother in the second trimester of pregnancy. \textit{See} http://en.wikipedia.org/wiki/Quickening. (last visited March 18, 2006).

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that abortion, if unrestricted, could pose a threat to the life of mother or child under certain circumstances.29

The gradual move back to the legalization of abortion thereafter was a fallout of intense campaigning by vocal feminist movements. In the U.S., therefore, abortion has primarily been viewed as an exercise of a woman's right to personal liberty. This right received judicial recognition in 1973,30 when the Supreme Court invalidated anti-abortion laws on the ground that such laws violated a woman's right to reproductive choice, which was inherent in her right to personal liberty.

B. State Policy in India

(ii) Abortion

In India, abortion is a criminal offence, as per the provisions of the Indian Penal Code, 1860.31 In the year 1971, Parliament passed the Medical Termination of Pregnancy Act ("M.T.P. Act"), which is an exception to section 312, Indian Penal Code, and permits abortion where the continuance of the pregnancy will cause "grave injury to mental or physical health." Interestingly, the explanation to the section provides that the anguish caused by a pregnancy resulting from the failure of family planning methods constitutes "grave injury to mental health" for the purposes of the Act. Strangely enough, this explanation applies only to married women, and does not recognize the anguish caused to an unmarried woman by an unwanted pregnancy. This indicates that the Act was motivated not by libertarian ideals but by the need to promote abortion as a family planning tool.32 Hence, the limited legalisation of abortion in India was more a fallout of Malthusian fears among policy makers.33

30 Roe, supra note 4.
31 See Indian Penal Code, 1860, § 312.
32 Strangely enough, the obvious demographic concerns which led to the passage of the M.T.P. Act find no mention in its objects and reasons clause. See generally Shilpa Phadke, Pro-Choice or Population Control: A Study of the MTP Act, 1971, available at http://www.hsph.harvard.edu/Organizations/healthnet/SAAsia/repro/MTPact.html (last visited March 16, 2006.)
33 As per Malthus, population increases by geometric progression, while food supplies increase by arithmetic progression. Therefore, according to the Malthusian model, human deprivation is the inevitable result if population growth is left uncontrolled. See T. Robert Malthus, An Essay on the Principle of Population as it Affects the Future Improvement of Society, with Remarks on the Speculations of Mr. Godwin, Mr.
Further, the Act does not leave the decision to abort with the woman. The satisfaction of the medical practitioner(s) that the grounds mentioned in the Act are satisfied, is a pre-requisite under the statute. This substantiates the argument that the Act was not envisaged as a tool for women to control their reproductive choices. Instead, the Act grants the veto power to a third person, the medical practitioner. Thus, abortion laws in India reflect that policy makers consider abortion a tool for controlling population growth, rather than an expression of a woman's right to control her body.

(ii) Forced Sterilisations

Another reflection of this anti-libertarian attitude of Indian policy makers, was the policy of compulsory sterilisations, enforced during the 1975 Emergency. Many State Government enacted laws to give legal backing to compulsory sterilization. The Punjab Government, for instance, passed a law making it an offence to have more than two children. This was in blatant violation of the reproductive autonomy of individuals.

This attitude of the Indian State towards reproductive autonomy has remained fundamentally the same in the post-Emergency era as well. For instance, the population policies of many States, in a disturbing likeness to the sterilization program of the Emergency days, provide that financial assistance at the Panchayat level is contingent upon a district’s performance in achieving “family planning targets.” Tagging sterilization with such massive monetary benefits precludes


34 M.T.P. Act, § 3(2). Where the length of the pregnancy does not exceed twelve weeks, the opinion of one medical practitioner, “formed in good faith” that the grounds for abortion under the Act are satisfied is required. Where the length of the pregnancy exceeds twenty weeks, two medical practitioners must be of such an opinion before the abortion can be legally performed.

35 See Stephen Trombley, Exploring Sterilization, available at http://www.hsph.harvard.edu, (last visited August 20, 2005). The effects of the mass sterilization programmes carried out under the aegis of the seemingly innocuous Ministry of Health and Family Planning were horrific. A large number of those who underwent sterilization died of complications resulting from the unhygienic conditions under which the operations were carried out. Id.

individuals from making an informed reproductive choice. In a country where over one-fourth of the population is below the poverty line, disincentives tagged with basic human needs such as food, do not remain mere disincentives. Inevitably, they take on a coercive character.

Reproductive autonomy is thus, effectively curtailed by most of India's population policies. That the Central Government in the year 2003 sanctioned a “targeted” approach to population control, whereby States would be expected to achieve sterilization targets, further substantiates this point. These policies entirely disregard the right to reproductive choices, and privilege State interest in population control over individual autonomy, in consonance with an utilitarian approach to State action.

(iii) Pre-Natal Diagnostic Techniques Act

Another enactment that throws up issues of reproductive rights is the Pre-Natal Diagnostic Techniques Act, 1994 (“P.N.D.T. Act”). This Act prohibits sex determination techniques in view of societal concerns over female foeticide. While the legislative intent is laudable, the strategy devised for the achievement of the goal may be subject to criticism.

First, the legislature seems to have missed the point that demand fuels technology and not vice versa. Clamping down on a particular type of technology is not a solution because the market can evolve other ways of catering to the demand. For instance, after the passage of the P.N.D.T. Act, pre-implantation and select couples drawn by lottery in every district. For a couple to be eligible to participate in this lottery, at least one of the spouses must have undergone sterilization. Id.

Maharashtra and Andhra Pradesh have gone a step further by providing the two-child norm as a criterion of eligibility for public welfare schemes such as the public distribution system. Upendra Baxi, Sense and Sensibility, 511 SEMINAR 33, 37 (2002).


pre-conception sex selection techniques, which were not prohibited by the 1994 Act, were developed. This necessitated an amendment to the Act in 2003, to bring these newly developed techniques of sex selection within its fold. If the strategy is to clamp down on technology, instead of on the demand for the technology, it seems that endless amendments are to follow.

Second, the P.N.D.T. Act ignores the fact that a coercive law lacking social acceptance is never the answer to socio-economic problems.41 The root of socioeconomic problems lies within society and therefore, the solution to them also lies in changing societal attitudes. Therefore, the mere enactment of a law prohibiting sex determination is not an effective strategy for preventing female foeticide, as is evidenced by the failure of the P.N.D.T. Act.42

Thirdly, the Act also fails to recognize that the ultimate goal of equality between the sexes cannot be achieved merely by ensuring the birth of an unwanted girl child. The quality of life of an unwanted girl child is invariably far poorer than that of her male siblings.43 In fact, this is one of the documented reasons for high mortality rates among girls in the 0-6 age group.44

Once again, the State has encroached upon the private realm of reproductive choices in order to serve a social objective, this time, without any real benefit to society.

41 Dowry prohibition laws, and laws with respect to domestic cruelty, are examples of how law is redundant in the absence of social acceptance and legitimacy.

42 Data suggests that the sex ratio has been declining steadily even after the passage of the Act, as is evident from the 2001 census. As per the census, although the all-India sex ratios have shown an improvement since 1991, the States in which incidences of foeticide are reported to be highest, the situation has only worsened. The sex ratio in Punjab has fallen from 882 to 874; in Haryana from 865 to 861 and in Delhi from 827 to 821. Census of India, 2001, available at http://www.censusindia.net/sex­ratio.html. The only documented effect of the statute has been to push sex determination underground. Consequently, the costs of the technology have increased significantly, thus taking it out of the reach of even those who seek to resort to it legally. Rupsa Mallik, Negative Choice: Sex Determination and Sex Selective Abortion in India, THE TELEGRAPH, March 11, 2004, available at http://www.genderhealth.org/pub­s/MallikOfSonsandDaughtersMar2004.pdf (last visited March 16, 2006).


44 Id.
(iv) State Policy and International Obligations

The Indian approach to reproductive rights is not only contrary to libertarian ideals, but is also in violation of India’s international obligations. A targeted approach to population control is specifically prohibited by international documents, to which India is a signatory. The 20 Year Programme of Action signed at the Cairo Conference, 1994, for instance, specifically rejects coercive State policies, including models based on incentives and disincentives, as tools for restricting population growth. Similarly, the 1995 Beijing Declaration recognizes that the recognition of women’s right to control “all aspects of their health, in particular their own fertility, is basic to their empowerment.” Other international law instruments, which have been signed by India, also recognize the right to reproductive liberty to varying degrees.

Thus, it is evident that the current population policy of the Indian State is antithetical to its international commitments and to the right to reproductive choices. State policy has always been geared towards privileging community interests in population growth over and above the individual’s right to reproductive choices. In the contemporary U.S. context however, State intervention in the exercise of reproductive rights has been minimal, since the Supreme Court decision in Roe in 1973. Keeping this background in mind, it would be interesting to draw from the constitutional jurisprudence in the two countries and compare the judicial attitudes in each case.

IV. REPRODUCTIVE AUTONOMY: A COMPARISON OF JUDICIAL ATTITUDES IN THE U.S. AND INDIA

Of the many issues that have been debated within the reproductive rights framework in the U.S., abortion and involuntary sterilization are of special

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45 Id.
48 Article 17 of the Universal Declaration on Human Rights, 1948 and Article 23 of the International Covenant on Civil and Political Rights, 1976 both recognize “the right to marry and found a family.” Article 16 of the Convention on the Elimination of All
relevance to the Indian context. Therefore, these issues form the central focus of this Section, which seeks to provide a comparison of judicial attitudes to reproductive autonomy in the two countries.

**A. Abortion**

The issue of abortion has been hotly debated in the U.S. since the early seventies. The two clashing interests underlying the abortion debate are the mother's right to make reproductive choices, which is derived from her right to personal liberty and privacy, and the foetus’ right to life. The anti-abortion groups, that is, the pro-lifers, primarily consist of those who are guided by religious beliefs, in arguing against abortion. The pro-lifers include the Catholic Church, orthodox Jews and fundamentalist Protestants. They assert that human life begins at the stage of conception and hence argue that the foetus qualifies as a constitutional person enjoying the right to life under the American Constitution. Their thesis therefore, is that abortion, which violates the foetus’ right to life, is nothing short of murder.

In the last few decades, courts in the U.S. have been faced with a barrage of cases challenging the constitutionality of statutes that seek to impose restrictions on abortion. At issue has been the clash of the State's interests in restricting abortion in light of religious beliefs and maternal health concerns and the woman's right to make independent reproductive choices.

The U.S. Supreme Court made its first attempt to resolve the conflicting interests at the root of the abortion debate, in *Roe v. Wade*. The case involved a

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Forms of Discrimination Against Women, 1979, stresses that both men and women shall be given equal rights to "decide freely and responsibly, on the number and spacing of their children."

49 GUPTA, supra note 29, at 89.

50 *Id.*

51 The pro-lifers' stance that foetal life stands on the same footing as that of the mother's, leads to the problematic conclusion that abortions must be prohibited even in situations where the mother's life is at stake, or where the mother-to-be is minor, incapable of bringing up a child, or when the pregnancy is a result of rape. Further, if the pro-lifers' argument were to be accepted, the unacceptable yet inevitable conclusion would be that the use of intrauterine devices or "morning after" pills, which prevent implantation of the embryo in the uterus after conception, is tantamount to murder. *See OTIS H. STEPHENS ET AL., AMERICAN CONSTITUTIONAL LAW 667 (2003).*

52 410 U.S. 113 (1973).
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challenge to a Texas law which made all abortions, except those necessary to save the mother's life, illegal. The Court held that the unborn child does not qualify as a constitutional person and hence, does not enjoy the right to life. Subsequent decisions have affirmed the view taken in Roe. In Roe, the Court also held that the right of privacy under the U.S. Constitution is broad enough to protect the right to abort.

The broad trend in the U.S. after the decision in Roe has been one of privileging personal liberty and autonomy, and the related right to privacy, over the interests of the State. Although in Roe, the Court held that there is no absolute right to privacy, it also declared that this right is a fundamental one, thus paving the way for strict scrutiny of government regulations relating to abortion. The Roe decision was pioneering in that it recognized that the State's interests in protecting unborn life cannot be allowed to override the interests of a pregnant woman, as pregnancy has a perceptible impact on the woman. Speaking for the Court, Blackmun, J. held that pregnancy has an impact on a woman's psychological, mental and physical health, which cannot be ignored by imposing unreasonable restrictions on the right to abort. At the same time, the Court also recognized that the State has an interest in "safeguarding health, in maintaining medical standards, and in protecting potential life."

The Court sought to harmonize State interests with the right to reproductive autonomy by introducing the trimester framework. It was held that in the first trimester of pregnancy, an abortion poses little danger to maternal health, so that the State cannot be said to have any interest in regulating abortions. In the second trimester, the State could regulate abortion to the extent that it reasonably relates to the protection of maternal health. Finally, beyond the period of viability, the State may prohibit abortion, except where it is necessary to preserve maternal health.

However, the decision in Roe was not in tandem with American public opinion of the time. The judgment was subject to widespread criticism to the extent that the judges who delivered their opinion in the case received hate mail and death threats. The conflict continued into the 1980s, as is reflected by the fact that in 1983, the U.S. Senate defeated by only a single vote, a constitutional amendment which provided that the right to abort is not guaranteed under the American Constitution. See Stephens, supra note 51.

55 Roe, supra note 4, at 154.
56 Roe, supra note 4, at 114.
Some aspects of the decision in Roe, that is, the rigid trimester framework, and the ruling that there is a fundamental right to abortion, have been rejected in the case of Planned Parenthood of Southern Pennsylvania v. Casey.\(^{58}\) However, the Court once again recognized that pregnancy has too great an impact on a woman's life and body for the State to prevent her from avoiding such impact, and deciding to abort the foetus.

In Casey, the Court replaced the trimester framework with the "undue burden" test whereby a restriction that placed an "undue burden" on the woman's right to abortion at any point during the pregnancy would be declared unconstitutional.\(^{59}\) This "undue burden" test has an adverse impact on the right to abortion, and is worthy of criticism. 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. Thus, the Casey decision is a regressive step for the liberal attitude of the U.S. Courts in the context of reproductive rights.

Interestingly, debates centred on the right to abort have been largely nonexistent in the Indian context. 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. Although the M.T.P. Act is in the nature of an exception to the general prohibition against abortion under the Indian Penal Code,\(^{60}\) the grounds on which it permits abortion are widely worded.\(^{61}\) The American pro-abortion campaign was sparked off by an unfavourable State policy towards abortion. Since the Indian State has been in favour of abortion due to its demographic concerns, a campaign against abortion laws was never the key agenda for feminist or other activist groups in India.

As far as the judicial attitude is concerned, it must be noted that 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, which is recognized as a

\(^{58}\) Casey, supra note 54, at 840.

\(^{59}\) Id, at 837.

\(^{60}\) See Indian Penal Code, 1860, § 312.

\(^{61}\) See M.T.P. Act, § 3.
ground for divorce in India. The Punjab and Haryana High Court decision in the case of *Satya v. Siri Ram* is a fitting illustration, where 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.

The attitude of the Indian judiciary, thus, reveals a complete disregard of the pregnant woman’s right to privacy, and her right to make independent reproductive choices. The U.S. judiciary, on the other hand, 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. Such a discussion is entirely missing from Indian decisions that touch upon the issue of reproductive autonomy. Hence, there is a sharp contrast between the judicial attitudes towards the reproductive rights of women in India and the U.S.

Spousal or parental consent as a requirement for abortion under abortion statutes has been the subject of much controversy and debate in the U.S. In a series of cases in the late seventies, the U.S. Supreme Court invalidated laws requiring parental consent for abortion by minors.

These decisions are based on the reasoning that the Constitution makes no distinction between persons in the conferment of rights. Hence, there is no justification for making an arbitrary distinction between minors and adults in recognizing the right to abortion. However, U.S. Courts have recognized that the State has a “broader authority” to regulate the activities of children. Further, it has been suggested that a statute providing for mandatory parental consent would pass judicial scrutiny if it provided for an alternate means of authorizing an abortion. In more recent decisions, the U.S. Supreme Court has abandoned its liberal view towards the requirement of parental consent by upholding laws requiring such consent for abortion.
The issue of spousal consent involves a balancing of the woman's right to privacy and personal autonomy and the spouse's interests in the life of the unborn child. According to the liberal view, 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. The man being a mere onlooker cannot enforce his choice, for the repercussions of the decision operate exclusively on the woman. A contrary view is that since both spouses contribute to conception, the ultimate decision regarding abortion should involve the consent of both individuals. U.S. courts have consistently adopted the former view, even going to the extent of invalidating laws requiring spousal notification prior to abortion.70

The author feels that the U.S. courts have been overtly zealous in seeking to protect the woman's right to abort. Mere spousal notification prior to the abortion is distinctly different from conferring a veto power to decide on abortion, on a person other than the pregnant woman. Such a requirement merely recognizes the husband's legitimate interests in participating in reproductive choices, by affording him an opportunity to influence the woman's final reproductive decision.71 Thus, the U.S. judiciary has erred 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. It may be concluded, therefore, that 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.

In India, the M.T.P. Act, which lays down the grounds under which an abortion may be legally performed, does not require that spousal consent be obtained before abortion. However, section 3(4)(a), M.T.P. Act, states that the pregnancy of a minor woman cannot be terminated without the written consent of her guardian. Clause (b) of the same provision runs as follows:

Save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

On a plain reading of the statute, it appears that it permits the consent of a minor woman to be dispensed with, if an abortion is to be performed on her, so

70 See Casey, supra note 54, at 893; Danforth, supra note 10.
71 It may be noted, however, that this opinion may not hold good in a rigidly patriarchal society such as India. In the Indian context, the requirement of spousal notification could conceivably result in coercive decision making, with the woman being denied any say in the matter.
long as her guardian’s written permission is available. As discussed, statutes with similar provisions have been invalidated by the U.S. courts.

Unlike in the U.S., no challenge has been posed to the constitutionality of such a requirement in India. However, the requirement of parental consent has been discussed in a 1993 decision of the Madras High Court. In a judgment that is unique for its liberal attitude towards reproductive rights, the Court held that section 3 does not imply that a pregnant minor’s consent is dispensable in making a decision to abort. It was held that while parental consent is a pre-requisite for an abortion to be performed on a minor, it cannot be a substitute for the minor’s personal consent. While this interpretation runs contrary to a plain reading of the provision, it was necessary in order to accord some meaning to a minor’s right to reproductive choices.

B. Involuntary Sterilization: Violation of Reproductive Rights

A discussion on the judicial attitude towards involuntary sterilization in the U.S. is of special relevance, since India has a long history of coercive sterilization programs. The nature of State intervention in abortion and in involuntary sterilization are however, largely dissimilar. While State interference in abortion is said to spring from its interests in the protection of maternal health and “potential life”, involuntary sterilization is motivated by concerns as diverse as eugenics and population control. Involuntary sterilization is perhaps the most severe violation of reproductive rights, for it has an irreversible impact on the right to reproductive choices, which is not the case where a restriction on the right to abort is concerned.

Interestingly, the U.S., despite being one of the oldest democracies in the world, has a long history of forced sterilization. The earliest case dealing with the issue, Buck v. Bell, cropped up in the late 1920s, where the Court upheld a Virginia

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73 In arriving at its decision, the Court held that Article 21 of the Constitution encompasses the right to privacy, which is subject only to “reasonable restrictions.” Id.

74 The advocates of eugenics believe that negative traits such as the propensity to commit crime can be traced to one’s mental makeup. These beliefs have collapsed with enhanced scientific understanding of genetics. See Michael G. Silver, Eugenics and Compulsory Sterilization: Providing Redress for the Victims of A Shameful Era in United States History, 72 GEO. WASH. L. REV. 862 (2004).

75 274 U.S. 200 (1927).
law, which provided for the forced sterilization of the “mentally defective.” The Court thus gave primacy to community interests in preventing the creation of an “incompetent society” over the individual’s freedom to make reproductive choices. The Court refused to recognize that the law amounted to a violation of the right to privacy.

The U.S. judiciary’s attitude to forced sterilization has, however, undergone a sea change with the de-legitimization of eugenics, which flows from an improved understanding of genetics, and the massive public protest against the mass sterilizations carried on by the Third Reich during the Nazi Rule. In the 1942 decision in *Skinner v. Oklahoma*, for example, the Supreme Court invalidated an Oklahoma statute, which provided for the sterilization of “habitual criminals”, as defined in the Act. The *Skinner* decision is significant for its express recognition of the right to procreate in the context of involuntary sterilization.

However, it must be noted that in *Skinner*, the judges chose not to overrule the *Buck* decision. Instead, they distinguished it on facts, and held that the involuntary sterilization of “feeble-minded” individuals is constitutionally permissible, since there conclusive scientific evidence to suggest that insanity is a hereditary trait. However, the case was distinguished on the grounds that no such evidence existed regarding the hereditary nature criminal tendencies. Thus, despite their avowed adherence to the belief that fundamental rights are available equally to all, the judges implicitly accepted the argument that the suspension of the most basic of rights is permissible in the case of certain groups.

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76 In Holmes, J.’s much criticized words:

> It is better for all the world...if society can prevent those who are manifestly unfit from continuing their kind.

*Id.* at 207.

77 In the years following the decision, twenty States passed laws similar to the Virginia statute. Nearly 2,000 “eugenics sterilizations” came to be performed annually at the national level in the 1930s. Silver, *supra* note 74, at 867.

78 *Id.*


80 *Id.*, at 536. In Douglas, J.’s words:

> [T]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right...basic to the perpetuation of a race—the right to have offspring.

81 Silver, *supra* note 74, at 869. In fact, the U.S. Supreme Court, in the much acclaimed decision in *Roe*, relied on *Buck* in order to establish that the right to privacy is not absolute, thus reaffirming the correctness of the evidently flawed judgment.
Reproductive Rights

Since the Court in Skinner did not declare involuntary sterilization to be per se unconstitutional, many States in the U.S. continue to have statutes that provide for involuntary sterilization. The Supreme Court’s failure to overrule the decision in Buck, forced the lower courts to follow the same, and thus ensured that statutes providing for the forced sterilization of certain groups continued to be upheld even as recently as the 1970s. However, in disposing off sterilization statutes on procedural grounds, State courts have often criticized the Buck decision, and have stated that forced sterilization amounts to a violation of fundamental rights. Although these observations are mere dicta, they have played a role in strengthening American jurisprudence against involuntary sterilization.

One aspect of involuntary sterilization that merits greater attention is that of the abuse of sterilization statutes. Data reveals that the frequency of sterilization increases from whites to blacks and from the educated to the uneducated. Spanish-speaking women, it has been shown, are twice as likely to be sterilized as those who converse in English. Thus, although the law is universally applicable, in practice, it is applied in a discriminatory manner, prejudicial to racial and other minorities.

The issue of involuntary sterilization, that has been so widely discussed in the U.S., has never been addressed in Indian courts. However, in the recent case of Javed v. State of Haryana, the Indian Supreme Court has examined the constitutionality of disincentives to promote family planning, and has tangentially touched upon this issue. It was contended before the Court that such disincentives are violative of Article 21 of the Constitution, as they infringes upon the right to personal liberty. The petition was dismissed in a decision that revealed the apathy of the Indian judiciary to the right to reproductive autonomy. While the judges waxed eloquent on the National Population Policy, and the need for family planning, there was little discussion on the fundamental nature of the right to reproductive autonomy, which is an essential feature of American decisions on

82 As of 2004, seven States, that is, Arkansas, Delaware, Georgia, Idaho, Mississippi, Vermont, and Virginia provide for involuntary sterilization under varied circumstances such as insanity, mental incompetence, etc. Silver, supra note 74, at 872.
83 Id. at 875. For instance, in the 1975 case of In Re Moore, 221 S. E. 2d 307, 312 (N. C. 1976), the North Carolina Supreme Court made generous use of eugenists’ language and held that the State had a compelling interest in “preventing the procreation of children who will become a burden on the State.”
84 Silver, supra note 74, at 875.
86 Javed, supra note 5.
related issues. While the judges did not expressly reject the argument that the right to procreate falls within Article 21, this was the ultimate effect of the judgment. It is implicit in the Javed decision that the judges are averse to the proposition that reproductive rights stand on the same footing as other aspects of the right to personal liberty. The reasoning of the judges is evident from the following quote from the judgment delivered by Lahoti, J.:

The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty.87

The decision illustrates that the Indian judiciary is very often inclined to privilege community interests over individual rights, which is clearly not the case in the U.S. Although the goal of population control may be a legitimate end, the State in a liberal democracy cannot infringe on the fundamental rights of citizens to achieve the same, particularly in light of the fact that alternate and equally efficacious tools such as education are available to the State in order to control population growth.88 The judges also failed to recognize this in Javed.

Further, the judgment rests on more than one unsupported assumption. They dismissed the argument that the Act unfairly taxes women who may be forced against their wishes to have a third child. The judges put forth the evidently fallacious proposition that since Indian women today are “empowered”, they cannot be forced to have children against their wishes.89

If the decision in Javed is an adequate indicator, there is a long way to go before the Indian judiciary can claim to have recognized the inviolability of the right to reproductive autonomy. In contrast with its attitude to fundamental rights in general, the judiciary seems to view reproductive rights as dispensable privileges. Judicial attitude in India, therefore, is in tandem with the belief of Indian policy makers that the need to protect reproductive rights is subsidiary to the need to control population growth.90

87 Javed, supra note 5, at 3067.
90 For instance, the judges reasoned that elected leaders are role models for society so that ensuring leaders with no more than two children would serve to popularize family planning in India's villages. Javed, supra note 5, at 3066.
Finally, the similarities in the controversies involving reproductive rights in India and in the U.S. cannot be missed. The prejudicial mode of enforcement of the two-child norm against Panchayat members alone mirrors the fact, that sterilization in the U.S. is a phenomenon largely restricted to blacks and other racial minorities. As per recent studies, most of the people affected by the Haryana legislation, belong either to economically or socially disadvantaged communities. Moreover, although population control is the stated objective of the Indian Government, a Bill seeking the application of the two child norm to legislators, has been pending in Parliament for over a decade. If the creation of role models for encouraging the two-child norm is the ultimate goal, as was stated in Javed to justify the Haryana legislation, there seems to be no rationale for the non-extension of the disqualification to members of the legislatures. Quite clearly, political factors have been of much significance to reproductive rights debates in India as well as in the U.S.

V. CONCLUSION

The U.S. judiciary’s attitude towards reproductive rights has undergone a drastic transformation in the last half-century. In a string of decisions, beginning with Roe, the narrow outlook in Buck was abandoned for a more liberal stand. However, it would be naïve to believe that the U.S. courts have achieved the perfect balance of interests in issues involving reproductive autonomy, such as abortion, and forced sterilization. For instance, while there is much to be appreciated in the current position that the requirement of spousal consent for abortion is unconstitutional, the argument that even spousal notification is an unreasonable restriction on a woman’s right to personal autonomy, seems to be flawed. By and large, however, it can be concluded that the U.S. approach to reproductive rights is predicated on libertarian beliefs and ideals.

These finer points, however, seem to be of little importance when compared with the Indian position. At the very outset, it must be noted that public opinion,

91 It is a notable point that as per a recent U.N. study, 70% of the persons affected by the Haryana legislation, have incomes below Rs. 30,000 a year. Yet another study indicates that 80% of those who have been disqualified from Panchayats for having violated the two-child norm, belong to Scheduled Castes, Scheduled Tribes and Other Backward Castes categories. Two Child Norm Brings Little Relief For Women, THE HINDU, July 1, 2004, available at http://www.hinduonnet.com (last visited August 20, 2005).

the Press and other societal institutions in India, have not really clamoured for the recognition of reproductive rights. Further, our judges are yet to fully recognize reproductive autonomy as one of the key aspects of the right to personal liberty. The approach of the Indian judiciary has always been to privilege community interests over individual autonomy and privacy.

The Indian judiciary has been cognizant of, and approved of the State's demographic concerns. This is well illustrated by the recent decision in *Javed*. Indian Courts and policy makers have consistently refused to recognize that although the goal of limiting population growth is a legitimate one, there is little justification for infringing on a freedom as fundamental as the right to procreate, in order to achieve this end. There is need for the Indian State to explore alternatives to sterilization such as education about family planning methods, literacy and women's empowerment. Kerala is a striking example of the fact that such an integrated policy, which balances reproductive rights with the goal of population control, can be a success.93

In the overall analysis, State policy and judicial attitudes in India may be characterized as utilitarian, seeking to achieve community interests in reducing population growth through abortion laws and population policy. Although the basic philosophy guiding State action and judicial pronouncements is clear, the area of reproductive rights in the Indian context remains one of confusion and contradictions.

There is a need for judicial or legislative intervention to clarify the many legal issues involved. The constitutional status of reproductive rights or the more fundamental right to privacy, for instance, is a murky issue even today. Equally pressing is the need to sensitize the legislature and the judiciary to the fact that reproductive choices are personal choices with which the State must not interfere lightly. In this regard, Indian policy makers and judges have much to learn from the evolution of reproductive rights in the United States. The challenge lies in imbibing the spirit behind the recognition of reproductive rights, and applying it to solve the social and legal dilemmas peculiar to India.

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93 Kerala has the highest sex ratio among all States at 1058 females for 1000 males, as of 2001. In fact, it is the only Indian State with more females than males per 1000. Since 1981, it has consistently registered the lowest growth rate of population amongst all Indian States. For instance in the decade from 1991-2001, the growth rate of population in Kerala was 9.42 as compared to the all-India average of 21.34. *Census of India, 2001, available at* http://www.censusindia.net/profiles/ker.html.