

## A COMPARATIVE STUDY ON CONSTITUTIONALITY OF ABORTION RIGHTS: EXPLORING THE INTERSECTION OF LGBTQ+ RIGHTS AND MENTAL HEALTH CONSIDERATIONS IN INDIA AND THE USA

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Mansi Shukla\* Jwaalaa Suresh\*

### ABSTRACT

*Abortion rights of women have been a hot topic being debated all around the world from social, political, and legal perspectives. This paper introduces the perspective of abortion rights from the view of one of the vulnerable groups of our society i.e. the LGBTQ+ community specifically the transgenders, lesbians, bisexuals, and queer. This paper puts the limelight on the recently struck down of one of the most landmark judgments in the world regarding abortion, Roe v. Wade. The abortion rights of the LGBTQ+ community are analyzed from the perspective of constitutional rights and the same comparison has been made between Indian and US Jurisdictions. The paper looks into the violation of fundamental rights due to the non-availability of abortion rights to the community in both countries. The paper further dives into the aspect of mental trauma of the LGBTQ+ community and the lack of healthcare services and medicines/drugs because of non-accessibility to abortion rights, social stigma, and biases. This paper puts forth what must be done in order to ensure that the LGBTQ+ community is not getting away with being violated of their fundamental rights by bringing into the comparison between India and USA.*

**Keywords:** Fundamental Rights, Abortion, Trauma, India, USA.

### CHAPTER 1: INTRODUCTION TO ABORTION RIGHTS

Abortion and reproductive rights have always been an issue to debate not only in India but around the globe and every now and then judicial precedents or amendments in the statute keep occurring and this makes sure that the topic never goes out of the limelight. Because of this upheaval, it makes the life of the citizens of the state a catastrophe. According to the reports, approximately one-seventh of the women enter into the pregnancy phase each year, and because of the flip-flop in-laws, they compel themselves to opt for risky and speculative methods to terminate their pregnancy which increases the risk of morbidity and mortality for

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\*BA LLB, FOURTH YEAR, SVKM'S NMIMS SCHOOL OF LAW, NAVI MUMBAI.

\*BA LLB, FOURTH YEAR, SVKM'S NMIMS SCHOOL OF LAW, NAVI MUMBAI.

both the pregnant women and the child present in the womb<sup>1</sup>. Triggering law has been passed in the U.S. as well where the landmark 1973 judgment *Roe v. Wade* has been struck down where previously the US Supreme Court held that a woman in her first trimester will be provided autonomy to make the decision on abortion of the fetus. In this landmark case, the Court had held that right to privacy was implied in the Due Process Clause of the 14th Amendment of the US Constitution and held the right to privacy is wider to encompass the autonomy of a woman to whether have an abortion or not<sup>2</sup>.

On closely observing it can be seen that the laws are not fair when it comes to a pregnant woman then thinking that the law will give protection and support to the LGBTQ+ community is a farfetched notion. LGBTQ+ here denotes Lesbian, gay, bisexual, transgender, and queer and the plus sign in the term is a gateway to any other form of sexual orientation and gender identities in a non-heterosexual and cis-gendered context<sup>3</sup>. By using this umbrella term we seek to reflect the variety of intersecting identities while also recognizing how inadequately this term describes all sexual orientations and gender expressions. The focus of this paper is not to distinguish between the terms or to do a term-based study but to analyze and throw light on the fact that this community suffers the most but their problems are still being kept in the dark in both the States. The taboo towards the community and the tycoon of social pressure in both the states even makes it harder for the people belonging to the community to talk about their impediments, the mental traumas they go through, and how the present existing laws violate their constitutional rights which makes their living an impasse with the social norms and unacceptance in the society. There is no legislation in both states even in the 21st century which addresses their issue which makes this category a non-existing sect of society.

## RESEARCH QUESTIONS

- How LGBTQ+ community in India and US have been excluded from abortion rights via legislative protection?
- Whether Indian and US laws talk about mental trauma suffered by persons who seek abortion rights, especially the LGBTQ+ community.

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<sup>1</sup> Prachi Dutta, *Women and the Law: An Analysis on the medical termination of pregnancy law in India vis-à-vis the Medical Termination of Pregnancy Act, 1971 and the Medical Termination of Pregnancy (Amendment) Bill, 2020*, SCC Online, Accessed on 23rd Sept. 2022, 7:10 pm

<sup>2</sup> *Roe v. Wade* 410 U.S. 113 (1973)

<sup>3</sup> Julie Croll, Laura Sanapo, Ghada Bourjeily, *LGBTQ+ individuals and pregnancy outcomes: A commentary*, 129, National Library of Medicine, 1625, 1659, (2022).

## CONSTITUTIONALITY OF ABORTION RIGHTS WITH RESPECT TO THE LGBTQ COMMUNITY

Because of the social problems and taboos associated with the LGBTQ community in both the states i.e. in U.S. and India their right to health has been compromised<sup>4</sup>. In reality, it has been the norm to demonize LGBTQ people. Instead of treating the illness, clinicians frequently harass or assault a transgender person sexually, or even worse, denounce the individual's "unnatural sexual inclinations. "Lesbian and bisexual women suffer twice as much since society does not recognize women's sexuality outside of their reproductive obligations. Lesbian and bisexual women find it exceedingly challenging to receive sexual and reproductive health services because the majority of them are tailored for heterosexual married women<sup>5</sup>. Instead of asking women if they are sexually active, health professionals more often ask if they are married. Even single women who seek medical attention run the risk of being embarrassed, subjected to public jeers, or simply confused. The condition of lesbian and bisexual women who are not married to males is made worse in this circumstance since it is perilous and challenging to disclose that they do not have a male companion<sup>6</sup>. This is not only prevalent in India but also in the most powerful nation of the globe and because of the discrimination and harassment the community resists themselves to visit to the clinic.

Discrimination against this community will also be against the 2014 landmark case which is *NALSA v. Union of India*<sup>7</sup>, where the Hon'ble Supreme Court ordered the equality of trans individuals. All these factors when built up create a lot of stress among the individuals of the community and people end up giving up their lives which again deals with the Right of an individual to live. No data and surveys have been conducted in both the states which can give a clear picture that how many individuals are suffering because of this trap which itself indicates that both the States have been ignorant about this issue and hence detrimental to the society. This not only violates Article 14<sup>8</sup>, Article 21<sup>9</sup>, Article 47<sup>10</sup>, and Article 15(1)<sup>11</sup> of the

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<sup>4</sup> Brittany Charlton. *Abortion Restrictions Harm LGBTQ People Now*, MS Magazine, Accessed on 23rd Sept. 2022, 19: 18 pm

<sup>5</sup> K Hodson, C Meads, and S Bewley, *Lesbian and bisexual women's likelihood of becoming pregnant: a systematic review and meta-analysis*, NIH, Accessed on 23rd Sept. 2022, 20:29 pm

<sup>6</sup> Ibid

<sup>7</sup> *NALSA v. Union of India* AIR 2014 SC 1863

<sup>8</sup> INDIA CONST. art. 14.

<sup>9</sup> INDIA CONST. art. 21.

<sup>10</sup> INDIA CONST. art. 47

<sup>11</sup> INDIA CONST. art. 15(1).

Indian Constitution and the 14th Amendment of the US Constitution<sup>12</sup>. No one may be deprived of their life or personal liberty, unless in accordance with the legal process, as stated in Article 21 of the Constitution. Article 21 of the Constitution defines "life" as more than merely the act of breathing<sup>13</sup>. It does not suggest the existence of insignificant creatures or that they lived a life of slog. It is far more significant and includes the right to health. In India under the DPSP as well Article 47 states that the state should be obliged to ensure fairness, human state of works, extension of disorder, mature age, disability, and maternity benefits, as well as to promote the overall health of the state<sup>14</sup>.

The court ruled in *Bandhua Mukti Morcha v Union of India*<sup>15</sup> that just because DPSP is not stringently applicable does not mean that it does not have any value. In this case, the Hon'ble court held that DPSP has a persuasive value and hence the State is required to implement them properly. The laws are applicable to the citizens of the state and in the ambit of citizens, transgenders are also included. Article 21 covers the right to health as well has been stated in the case of *State of Punjab v. M. S. Chawla*<sup>16</sup> and the 14th amendment<sup>17</sup> states about the promotion of health equity and in the case of *Jacobson v Massachusetts*<sup>18</sup>; it was held by the US Supreme Court that it is the duty of the state to take care of the health of the citizens and public health along with public safety should be the priority of the state. The *Paschim Banga Ket Mazdoor Samity*<sup>19</sup> case significantly expanded the application of Article 21; the court there stated that it is the duty of the government to ensure that everyone receives proper medical care and to promote public welfare. Additionally, Article 21 places obligations on the state, requiring it to defend and uphold the rights of every individual<sup>20</sup>.

In another decision, the Hon'ble Supreme Court ruled that health is a basic right that goes beyond just being free from illness or disease. The availability of medical and health facilities encourages employees to perform as productively as possible, both physically and mentally. In conclusion, healthcare facilities are included in social security<sup>21</sup>.

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<sup>12</sup> US CONST. amend. XIV

<sup>13</sup>Supra Note 9

<sup>14</sup>Supra Note 10

<sup>15</sup>Bandhua Mukti Morcha v. Union of India 1984 AIR 802

<sup>16</sup>State of Punjab v. M. S. Chawla AIR 1997 SC 1225

<sup>17</sup>Supra Note 12

<sup>18</sup>Jacobson v Massachusetts 197 U.S. 11 (1905)

<sup>19</sup>Paschim Banga Ket Mazdoor Samity 1996 SCC (4) 37

<sup>20</sup>Supra Note 20

<sup>21</sup>Mariner WK, Annas GJ, Glantz LH. *Jacobson v Massachusetts: it's not your great-great-grandfather's public health law*, National Library of Medicine., Accessed on 23rd Sept. 2022, 20:29 pm.

Right to health do not only constitute physical well-being but mental well-being as well and it is evident from the fact that even the government of India considers it as an important factor that has a nexus with Article 21 of the Constitution which is why there is a statute as well by the name of Mental Health Protection Act 2017<sup>22</sup> and in America it is named under American with Disabilities Act 1990<sup>23</sup>. Statues of both the State includes stress as a disruption of mental well-being. Now if an individual belonging to the LGBTQ+ community is being harassed at the medical clinic for the purpose of abortion it will create stress which is indirectly induced by the State and hence it will be in violation of the fundamental right of the individual. It is pertinent to note here that since the topic is abortion the constitutional rights of the LGBTQ + community is not only getting violated with the health aspect of it but there are other strings attached to it which are also responsible for violating the constitutional rights of the citizens of the State like for example in the case of *Suchita Srivastava and V. Krishnan*<sup>24</sup>, the Hon'ble Supreme Court of India interpreted that the mother has a fundamental right over her body and it depends on the mother that whether she wants to keep the baby or not. Nowhere, has it been mentioned that an individual belonging to the LGBTQ+ community cannot be stated as a mother and hence discrimination cannot be made on this ground.

### **CHAPTER 3: MENTAL TRAUMA SUFFERED BY LGBTQ COMMUNITY WHILE ACCESSING ABORTION RIGHTS**

Under the provisions of the Medical Termination of Pregnancy Act of 1971<sup>25</sup>, it is observed that the Act does not speak about any kind of mental trauma or related psychological effects that women face when they try to abortion rights. And there is the further exclusion of mental health of the LGBTQ+ community who are more susceptible to mental trauma due to pre-existing social stigma, and discrimination prevailing in society. Also, even the latest MTP Amendment Bill 2020<sup>26</sup>, has not been inclusive of mental trauma indicating still now State has not considered the hardships faced by women and the LGBTQ+ community. The prevalence of 'queerphobia' has caused much stress, degradation of mental health in India and many other countries of the world<sup>27</sup>. In India, the LGBTQ community cannot access healthcare in a fair manner and will be subjected to prejudice and discrimination, making

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<sup>22</sup> Mental Health Protection Act 2017, No. 10 of 2017, Acts of Parliament (India)

<sup>23</sup> 104 Stat. 327

<sup>24</sup> *Suchita Srivastava and V. Krishnan* 2009 9 SCC 1

<sup>25</sup> The Medical Termination of Pregnancy Act of 1971, No. 34 of 1971, Acts of Parliament (India)

<sup>26</sup> Medical Termination of Pregnancy (MTP) Amendment Bill, No. 8 of 2021, Acts of Parliament (India)

<sup>27</sup> Perna Mitra. Pride Month: Addressing mental and emotional trauma among LGBTQ+ members. Times of India (30 June 2022) Accessed on 23 Sept, 2022, 10:15 pm

them more vulnerable to psychological trauma and stress. The model in hospitals is not inclusive of different gender and sexual orientation<sup>28</sup>.

In the US, as per the survey conducted by the National Alliance on Mental Illness has found that the cultural, social, and economic conditions of the LGBTQ+ community negatively affect their mental health<sup>29</sup>.

In India, mental health is governed under The Mental Healthcare Act 2017<sup>30</sup> and in the US, Americans with Disabilities Act, of 1990<sup>31</sup>. Also, the inaccessibility of abortion pills by LGBTQ+ easily will also cause an increase in mental trauma as drug stores also discriminate and stigmatize queer people.

As per the case of *Bandhua Mukti Morcha v. Union of India*<sup>32</sup>, the Court held that the right to health is a part of Article 21 of the Constitution. Here, health must not be confined to only physical health and the absence of diseases. As per WHO<sup>33</sup>, health implies a situation where a person is healthy holistically in terms of physical, mental, and social well-being. So, not including provisions by the State on providing help to women and the LGBTQ+ community who seek abortion rights will be violative of Article 21 of the Constitution.

In 1973, the US Supreme Court in the landmark case of *Roe v. Wade*, held the validity of abortion rights in India as per the constitutional principle of privacy and liberty of a woman to terminate a pregnancy in her first trimester as per the 14th Amendment and subsequently in the second trimester, the state can impose certain restrictions and finally in the third trimester, if the fetus is viable, the state can restrict or prohibit abortions. In this landmark case, the Court had held that right to privacy was implied in the Due Process Clause of the 14th Amendment of the US Constitution and held the right to privacy is wider to encompass the autonomy of a woman to whether have an abortion or not. The Court held that laws will contain exceptions so as to protect the life and health of the mother<sup>34</sup>.

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<sup>28</sup> N. Nakkeeran, Barathi Nakkeeran. Disability, mental health, sexual orientation and gender identity: understanding health inequity through experience and difference. 16 Health Research Policy and Systems 10-19 (2018)

<sup>29</sup> Supra Note 27

<sup>30</sup> Mental Health Protection Act 2017, No. 10 of 2017, Acts of Parliament (India)

<sup>31</sup> 104 Stat. 327

<sup>32</sup> *Bandhua Mukti Morcha v. Union of India* 1997 10 SCC 549

<sup>33</sup> World Health Organization. Global Health Observatory: Health and Well Being. Accessed on 23rd Sept, 2022, 11:52 pm.

<sup>34</sup> *Roe v. Wade* 410 U.S. 113 (1973)

But the same was overturned in the case of *Dobbs v. Jackson*<sup>35</sup>, stating that abortion is not protected under the Constitution as there is no such reference and thereby held abortion rights to be unconstitutional. This judgement will now severely impact of LGBTQ community increasing their mental trauma while accessing their reproductive rights. Also, in the US as well, due to prejudice and social stress, and stigma faced by this community while accessing abortion rights, it has been reported they may times face psychological distress and face cognitive burden<sup>36</sup>. Due to the denial of fair treatment in hospitals, they are more vulnerable to mental torture and trauma as they face extreme discrimination. It can be observed that US state laws are also ignorant of the mental health of the community while they access reproductive rights. Not providing the same via laws by the State will also be violative of the 14th Amendment<sup>37</sup>.

With respect to Jurisprudence, as per John Locke's theory that life, liberty, and property are natural rights that remained with an individual every time. The Natural Law theorist John Locke stated that man has natural rights like life, liberty, and property that are important for an individual and should be protected by the State and law<sup>38</sup>. Similarly, St. Thomas Aquinas stated that natural law is considered the basis for the formation of human laws which are also called positive laws. If any positive law is not in cooperation with natural law, it cannot last long<sup>39</sup>.

Articles 14<sup>40</sup>, 19<sup>41</sup>, and 21<sup>42</sup> of the Indian Constitution and the US Constitution<sup>43</sup> are developed in the line of Natural laws only. If positive laws violate Constitution, then natural laws will also be violated. According to Locke and Aquinas, life and liberty is a natural right, and thereby State and law must protect the same, so abortion rights of LGBTQ+ along with their mental health rights which fall under the purview of the Right to life and personal liberty must be protected by State. Currently, both Indian and US laws have failed to acknowledge the rights of this community with respect to abortion. If State fails to protect the LGBTQ community and their mental health, then the natural laws will be automatically

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<sup>35</sup> *Dobbs v. Jackson* 597 U.S 2022 WL 2276808

<sup>36</sup> Ilan H. Meyer *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence* 129(5) 674-697 National Library of Medicine (2003)

<sup>37</sup> US CONST. amend. XIV

<sup>38</sup> N.V. PARANJPE, *STUDIES IN JURISPRUDENCE AND LEGAL THEORY*, 164, 9<sup>th</sup> ed. 2019

<sup>39</sup> *Ibid*

<sup>40</sup> INDIA CONST. art.14

<sup>41</sup> INDIA CONST. art. 19

<sup>42</sup> INDIA CONST. art. 21

<sup>43</sup> US CONST.

violated. Constitutional laws cannot exist without natural law, thereby positive laws must ensure upholding both constitutional and natural law.

## CONCLUSION

It is high time that we as a society as well as a State see that change in society is inevitable and the laws of the society should also change as per the prevailing change. Now, the LGBTQ community has come forward and made themselves more visible to society, it is necessary that laws and society must recognize their right and ensure equal protection under the law and should not deny them the same rights just because they identify themselves in a different manner sexually. They should also be granted constitutional rights equally. It was observed that India and US do not recognize the LGBTQ community in abortion laws and also fail to recognize the aspect of mental trauma they face in the statutory laws. It is high time to recognize them as well for abortion rights and reproductive healthcare. The absence of such provisions is violative of Articles 14, 15, and 21 of the Indian Constitution, violating fundamental rights and the 14th Amendment of the US Constitution. It is also violative of international conventions and natural law principles of Locke and Aquinas. The overturning of *Roe v. Wade* has also posed significant hardships for women as well as the LGBTQ community. Immediate Reforms are required to be made in abortion rights in India and US. But it is to be noted while the US has been repealing pregnancy laws, India has done progressive strides in upholding the law and Supreme Court and High Courts have tried to ensure abortion and reproductive rights under MTP Act, only need is to expand the law to LGBTQ community via an amendment.

## SUGGESTIONS

- Clauses in favour of the LGBTQ community and provisions that recognize queer people must be added to the MTP Amendment Bill, 2020.
- The Act must be made gender-neutral making inclusive of third-gender and other queer communities as well in both Indian and US statutory laws.
- Mental Trauma is a very important aspect to be considered. Ensure US and India add specific provisions that address mental trauma and psychological distress of women and the LGBTQ community by providing them mental healthcare services and fines/punishments for people who harass them for choosing their reproductive rights.



- The judiciary must ensure more awareness of the need for accessibility of abortion rights for the LGBTQ community and about the mental health of such people.
- Judiciary and Executive in both countries must focus on the ‘right to choose’: either to get or not get an abortion. They should not force any decision and ensure that they are given autonomy to the person who is taking these decisions.



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