

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 3

2020

© 2020 *International Journal of Law Management & Humanities*

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

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

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Abortion Around the World and Women: Are We There Yet?

DIVYA SRIVASTAVA¹ AND SHIWANI AGRAWAL²

ABSTRACT

In 2019, nearly 30 state legislatures of the United States of America passed anti-abortion bills which seek to either ban abortion outrightly like in Alabama or allow abortion only up till 6 weeks into the pregnancy- like in Louisiana- which is too soon as many women even don't even know that they are pregnant within 6 weeks' time. This has given considerable momentum to the century old debate of pro-life v. pro-choice, not just in America, but worldwide. In light of the above scenario, this paper aims to critically analyse the Anti- Abortion Regime in the USA, the chain of events that has led to this rather controversial state of affairs, and draw comparisons with international jurisdictions of India and Uruguay.

I. INTRODUCTION

For much of American legal history, abortion was not regulated before “foetal quickening” stage - the stage after which movement could be detected in the womb. By the mid- 19th century, abortion had become a booming business and many women ending their pregnancies were married, white, and middle-class.

In 1857, the recently formed American Medical Association (the AMA) began an ultimately successful movement to criminalize the practice of abortion except when a woman's life was at risk. The AMA had scientific, moral and practical reasons for seeking to change abortion laws. Scientifically, many physicians argued that quickening was largely irrelevant because after fertilization a new human life could take shape if no one interrupted its development. Morally, the AMA contended that any kind of forceful termination of life was wrong — and that if abortion business continues it would subvert women's traditional roles as the ‘birth giver’ and further subvert the “genetic stock” of the United States as wealthier women will continue to have fewer children than the poor women. Practically, physicians worried that midwives and other competitors — most of whom were more willing to offer cheaper abortion services than the physicians— would steal patients. By lighting to criminalize

¹Author is a student at Symbiosis Law School, Noida, India.

² Author is a student at Symbiosis Law School, Noida, India.

abortion, doctors could claim a moral edge over the competition. This movement was a stunning success; by 1880, every state in America had introduced criminal abortion laws (making narrow exceptions when the procedure was needed to save a woman's life).³

But the reality of abortion in America differed from the letter of the law. Some doctors still performed abortions, despite the fact it was illegal to do so, and prosecutors enforced the laws unevenly and unpredictably. Prosecutors generally targeted abortion providers, particularly when a woman died as a result of a procedure. However, prosecutors had the power to subpoena women and force them to serve as witnesses in criminal cases brought against doctors. These women had to answer deeply personal questions in open court and faced intense questioning from opposing attorneys, and often their stories found their way into local newspapers. While women rarely faced prison time for having had an abortion, the prospect of public humiliation likely served as a deterrent to women who might otherwise have considered abortion.

II. BRIEF HISTORY OF THE 'ANTI-ABORTION' MOVEMENT IN AMERICA

In March 2016 presidential candidate Donald Trump argued that women who had abortions should be punished and abortion should be made illegal. Trump quickly reversed himself; but the previously pro-choice candidate had stumbled into an argument that pro-life advocates have studiously avoided over the last forty years for fear of being labelled anti-woman. Some social observers looked at such statements and wondered if they signalled the declining importance of pro-life politics, and social conservatism more broadly, to the Republican party. Is the antiabortion movement no longer relevant in the United States? Those who would answer yes might suffer from myopia. In fact, the antiabortion movement, in its many iterations, has radically transformed Americans' ideas about women's bodies, reproduction, feminist politics, and of course, fetal life. In the two centuries the movement has existed, its constituencies, tactics, and tools have all changed. But what has remained is the effect this movement has had on women's lives. In the end, the pro-life movement transformed ideas as it also restricted the real ability of American women to access reproductive healthcare.

The system of legal but quiet abortions fell apart in the mid-nineteenth century. The first 'Tight-to-life' movement was not led by grassroots activists, but rather physicians, anxious about their professional status, as discussed above. In the early nineteenth century, a variety of other healers competed with physicians for business, especially the business of women's

³Leslie Reagan, *Dangerous Pregnancies: Mothers, Disabilities, and Abortion in Modern America* (BERKELEY: UNIVERSITY OF CALIFORNIA Press (2010)).

reproductive healthcare. While many physicians believed that scientific medicine would benefit their patients, some, in order to hurt lay healers' business, sought governmental licensing and regulation to weed out the competition. Physicians used anti-abortion laws, pushed in state legislatures, to increase their own stature and undermine their opponents.⁴

Of course, many would have narrated this story very differently. Some physicians claimed that this campaign was a product of superior medical knowledge. Many argued that women (and rag-tag group of healers who offered abortion) did not have adequate embryonic knowledge to determine when life began. But historians have noted that this medical insight was not a result of any advancements in embryonic knowledge. In fact, there were none during these campaigns. Instead, the fetus was merely a stand-in for a broader cultural project. Here, the movement tapped into concerns over women's increasing education, autonomy, and the extension of rights, as it reasserted women's connection to and limitation by their own reproductive anatomy. Women's bodies, not their words or actions, confessed to doctors the 'naturalness' of uninterrupted reproduction and the "truth" about fetal life. Bodily processes could speak for themselves, though they did need doctors to translate.

III. LEGALISATION OF ABORTION THROUGH JUDICIAL ACTIVISM IN 1970S

The 1973 *Roe v. Wade* decision, legalizing abortion in all fifty states, changed everything and yet nothing. In the 1970s the anti-abortion movement remained heavily Catholic, and they continued to pitch their issue as a rights issue rather than a religious one. But in other essential ways the movement changed. Before *Roe*, the anti-aborts movement was very small, geographically dispersed, and focused on individual state legislatures. After 1973 activists and state legislators alike worried that *Roe* prescribed a one-size-fits-all abortion law that could only be addressed at the national level. Thus, in the 1970s, activists promoted the Hyde Amendment (which successfully prohibited federal funding of abortions through Medicaid) and pushed, unsuccessfully, a constitutional amendment banning abortion. After 1973 the direction of pro-life activism changed, even as its demographics and core political arguments remained the same.⁵

While antiabortion activists retained their focus on individual fetal rights, they began to develop new ways to convey that message to the public that focused on the fetus and excised the woman. The tools that had the largest effect were graphic pictures of aborted fetuses, the most important drawn from John and Barbara Willke's Handbook on Abortion. Some later

⁴What's going on in the fight over US abortion rights?, BBC NEWS, June 14, 2019, retrieved from: <https://www.bbc.com/news/world-us-canada-47940659>

⁵McCurdy SA. *Abortion and public health: Time for another look* 83(1) LINACRE Q. 20, 24-25 (2016).

called it the “Bible of the pro-life movement.” The Willies were a Catholic couple, a doctor and a nurse, who became convinced that pictures would help end legal abortion. The four pictures they put in their book, collected from sympathetic doctors and pathologists, were quickly reproduced and used in all parts of the movement. Their work built on a longer, medical history of viewing and personifying the fetus. Twentieth-century medical advances extended nineteenth-century doctors’ interest in fetal life. After World War II, new medical technologies allowed doctors to view and treat fetuses in new ways, while others examined fetal development for the cures to persistent human problems, ultimately personifying and individualizing the fetus. The Willkes and others simply extended this medical tradition into politics. They became sure that images helped people to understand a fetus, legally and culturally, as a baby. Thus the movement continued to develop new tools and technologies to this end: pictures of fetuses, in utero and aborted, fetal models, and fetuses in jars in the 1970s; fetal pins, dolls, jewelry, and clothes in addition to a proliferation of pro-life movies in the 1980s; and ultrasound visuals of fetuses in the 1990s and 2000s. Using these images, activists made a political pitch and moved fetal bodies squarely into American political culture.

As rescues captured the imaginations, enthusiasm and anger of many anti-abortion activists, others continued to do the quiet work of incremental legal change. In the 1980s and 1990s, many pro-lifers, especially those who remained in more mainstream right to life groups, focused on making access to abortion more difficult on the state level. Due to their efforts, states across the country passed laws that required parental notification, “informed consent” (mandating women view materials about fetal development and the risks of abortion), and waiting periods between the initial consultation and the abortion. In 1992 the Supreme Court validated the legality of such laws in *Planned Parenthood of southeastern Pennsylvania v. Casey*, crafting a new rationale to determine the constitutionality of laws regulating abortion. Restrictions were legal as long as they did not place an ‘undue burden’ on women seeking the procedure, validating the work of anti-abortion activists and making abortion increasingly difficult to access especially for rural or poor women. The radical and moderate groups differed in terms of strategy, but together they succeeded at reorienting the conversation about abortion. Both types of groups worked to make pro-life politics central to social conservatism and by extension the Republican party. They made fetal life central to how many Christians viewed their religion and their politics. They asked conservative children to think of themselves as “survivors of the Abortion Holocaust.” And they helped new “family values” constituents consider the fetus as a member of the family and legal abortion the

biggest challenge facing the modern family. In all these efforts, activists were successful not for all Americans but for enough to build an expansive movement with the defense of fetal life as its core.⁶

IV. ABORTION IN URUGUAY

It was imperative that we include Uruguay in our analysis as it has emerged as one of the most progressive nations when it comes to abortion laws in the twenty first century. After 25 years of struggle by feminist groups, Uruguay's parliament finally decriminalized abortion in 2012. Under the current laws, pregnancies up to 12 weeks can be terminated regardless of circumstances, and up to 14 weeks can be terminated in cases of alleged rape. There is also a mandate on the woman seeking abortion to discuss it with a panel of three professionals, that is a gynaecologist, a mental health expert and a social worker. It is only after going over the risks and alternatives, and thinking it through for a minimum of five days, which is called day "reflection period", can the woman go ahead with the procedure.

It is almost a matter of amusement that such a modern approach towards women's rights and abortion comes from a small nation located in a predominantly Catholic continent. The long separation of religion and government has been touted as the primary reason for the same. Many women's rights activists attributed the passage of the new law to the political activism of the feminists and the fact that leftwing parties controlled the parliament and the presidency during 2011-12.⁷

V. ABORTION IN INDIA

Abortion was legalized in India in 1971 after the Shah committee (formed in 1966), appointed by the government of India, carried out a complete review on socio-cultural, medical and legal aspect of abortion. Before that, under Section 312 of The India penal code, 1860, abortion was illegal and "causing miscarriage" was a punishable offence. India, over the time, articulated itself to reproductive rights in various international platforms.⁸ The Medical Termination of Pregnancy Act was then in 1971 passed in the Indian parliament, thus legalizing abortion. However, even after that, access to safe abortion was an issue for a very long time. The grounds for abortion included injury to the health of the woman, sex crime etc. Even then, the act came across as something that was made for the protection of

⁶John Irving, *The Long, Cruel History of the Anti-Abortion Crusade*, THE NEW YORK TIMES (June 23, 2019, 10:04 AM), <https://www.nytimes.com/2019/06/23/opinion/anti-abortion-history.html>

⁷Pamela Duncan, Molly Redden and Jonathan Watts, *Abortion laws around the world: from bans to easy access*, THE GUARDIAN, January 5, 2016.

⁸United Nations Report of the Fourth World Conference on Women Beijing, 4-15 September 1995

medical practitioners, rather than for safe abortion and protection of women. The 1971 Act demands that if the pregnancy is of less than 12 weeks, at least one medical practitioner and if it is of less than 20 weeks, then at least 2 medical practitioners need to be of the opinion that the termination is essential for the safety and well being of the woman, thus completely taking away the autonomy of abortion from the woman. Apart from that, it is clearly prejudiced against unmarried women, as explanation 3(2) of the said Act uses the term “where the pregnancy occurs due to failure of usage of any birth control device by any **married woman or her husband**, thus making its applicability to unmarried woman a contesting debate over time.

However, there have been some landmark judgments to hold a woman’s reproductive right as her fundamental right to privacy like *Suchita Srivastava v. Chandigarh Administration*⁹ and *Devika Biswas v. Union of India*¹⁰, but no formal amendment has been made in the MTP act to reflect the same.

Unlike USA and Uruguay where laws have changed due to political movements and uprising, India is at the mercy of Supreme Court’s interpretation of Article 21 and the provisions of the MTP Act for a progressive or regressive approach towards abortion. Even though there have been some pro life-pro choice debates in the Indian political scenario, never has abortion been an agenda on any of political party's lists. This could be one of the reasons why the country is not very motivated to bring a change in the existing law.

VI. CONCLUSION

While it is true that the issue in India is not as politicised as in USA or Uruguay, and as a result laws not up-to-date or rigid, it allows the courts to look at each case individually based on its facts. In 2017 the Supreme Court of India allowed the abortion of a 32-week-old foetus carried by a 10-year-old rape survivor, overruling the decision of the High Court. The child had been repeatedly raped by her maternal uncle over several months. Her parents remained unaware of the crime until she was found to be pregnant beyond 20 weeks. The 1971 Medical Termination of Pregnancy (MTP) Act allows abortions only up to 20 weeks in cases where “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”. Since the law requires court approval for aborting a foetus that's more than 20 weeks old, the girl’s impoverished family in Chandigarh approached the district court. Their request was turned down first by the said court and then

⁹(2009) 9 S.C.C. 1 (India).

¹⁰(2016) 10 S.C.C 726 (India).

by the Chandigarh high court. The foetus was 26 weeks old, when the case went to the Supreme Court and the medical board appointed to look into the matter took another month to give its report. SC advocate Alakh Alok Srivastava had filed a public interest petition sacking an abortion on the grounds that doctors had found the girl's pelvic bones were not fully developed, putting the life of both mother and baby at "very serious risk".

Had the same case taken place in Alabama, after the passage of the recent "pro-life" bill, the ten- years old girl would have been put through an unimaginable torture. Why we think it is women's issue more than a political issue is because as it does protect the "sanctity" of unborn life, but, with one very curious exception: The law deems only fertilized eggs inside the womb of a woman worthy of protection, not ones routinely destroyed in the process of fertility treatment. "The egg in the lab doesn't apply", Clyde Chambliss, state senator and sponsor of the abortion bill, said during Alabama legislative Debate. He also said "If It's not in a woman, she is not pregnant."

Although the 'anti-abortion' movement in America is claimed to be an individual rights movement, a civil rights movement, a wily values movement, and a women's movement, but rape victims, women living in poverty, in rural areas, and in red states, trying to use their constitutionally guaranteed right to an abortion, would tell you a different story.
