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Critical Analysis of Minors Right to Abortion under Medical Termination of Pregnancy Act, 1971

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ABSTRACT

Access to safe abortion is one of the key aspects of the Reproductive rights guaranteed under the Constitution of India. Every woman irrespective of their status is entitled to the safe and legal abortion. However, the necessity for guardian approval in cases involving minors presents a considerable obstacle for minors seeking safe abortions. This paper examines the issue of requirement of guardian consent under the Medical Termination of pregnancies act, 1971 for abortion in the case of minor girls whether married or not. In addition to this, it also explores the complexities surrounding the necessity of guardian consent, its impact on individual's reproductive rights and body autonomy and the broader implications on women's healthcare.

Furthermore, this paper also explores the international perspective on guardian consent by examining and analyzing United States of America approach towards it. The aim of this paper is to give a thorough knowledge of the worldwide discourse on guardian permission for abortion by contrasting various legal environments and cultural situations. It promotes a rights-based strategy that recognizes that everyone has the universal right to make autonomous decisions about their bodies, regardless of their age or marital status.

In conclusion, this paper significantly advances the current discussion on legal requirements and reproductive rights. It advocates for changes that are consistent with international human rights standards and assuring that everyone, including minors and adult people, can exercise their right to a safe and legal abortion.

Keywords: *Abortion, MTP Act, Section 3(4)(a) of MTP Act, Right to Reproductive Choice, Right to Privacy.*

I. INTRODUCTION

“A women's right to reproductive choice is an inseparable part of her personal liberty under Article 21 of Constitution of India. She has a sacrosanct right to bodily integrity.”²

-Hon'ble Supreme Court

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² X V. The Principal Secretary Health and Family Welfare Department & Anr., 2022 Live law (SC) 809

Abortion being the subject of global discussion had sparked the intense debates as there was a dilemma whether women had a right to make decision regarding giving birth to the child. India being entangled in this dilemma, enacted a comprehensive central law to address the complexities surrounding the abortion. And the legal framework stemmed from the constitutional recognition of the Right to life and Liberty guaranteed under Article 21 of the Constitution of India. Article 21, with its wide scope, safeguards numerous fundamental rights for the Citizen, and within this framework lies the Right to Abortion. “Right to Abortion has been recognized under the Right to Privacy which is a part of the right to personal liberty, and which emanates from right to life”³. The same was recognized by the Hon’ble Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration*⁴ in the following words “*there is no doubt that a women’s right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating*”. The decision of the Suchita Srivastava case was reiterated in the case of *Justice K.S. Puttaswamy and Anr. V. Union of India and Ors*⁵, wherein the Court held “that the decision of a women to procreate or abstain from procreating is a facet of her right to lead a life with dignity and the right to privacy under Article 21 of the Constitution”⁶.

But the right of reproductive choice recognized by the supreme court in various cases is not absolute like other fundamental rights and is regulated by the Medical Termination of Pregnancies Act. It was held in the case “that the provisions of the MTP Act, 1971 can be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”⁷ The MTP Act prescribes the procedure and the conditions in which a woman irrespective of their age and marital status can abort a child. Along with this, the MTP act also contains specific requirements which serve as a barrier for Abortion and one of them is the guardian consent required for abortion by minor girls. This begs crucial concerns regarding how closely a provision like this adheres to the values established in the previously cited decisions as well as the general spirit of the constitution. In this paper, we will analyze the practical implications of guardian consent on women seeking abortion, taking into account the issues of agency, confidentiality, and timely access to safe reproductive healthcare.

³ Sai Abhipsa Gochhayat, *Understanding of Right to Abortion under Indian Constitution*, Manupatra, (Dec.25, 2023, 11:11) <https://manupatra.com/roundup/373/Articles/PRESENTATION.pdf>

⁴ (2009) 9 SCC 1

⁵ (2017) 10 SCC 1

⁶ Prashant Kanha, *A women’s right to Reproductive Choice is a facet of a Fundamental Rights*, (Dec. 26, 2023, 11:30) <https://www.prashantkanha.com/a-womans-right-to-reproductive-choice-is-a-facet-of-fundamental-right/>

⁷ *Suchita Srivastava v Chandigarh Administration* [3 (2009) 9 SCC]

II. ABORTION UNDER MTP ACT

The statutory framework on abortion is provided under the Indian penal code, 1860 and the MTP Act, 1971. Indian Penal code. 1860 which is the substantive law of the country i.e. the law defining the offences and crimes, had made voluntary causing miscarriage as a criminal offence under section 312-316 of the code and prescribes punishment for the same. Here the word “abortion” has not been expressly used but as per legal interpretation the term ‘voluntary miscarriage’ stands for the criminal abortion. Amidst the rigidity of these provisions, a need arose for having a lenient framework on abortion as these provisions had the effect of undue infringement of women’s right to make autonomous decisions regarding the reproductive choice. And as a result, in the year 1971, the MTP Act was enacted in order to liberalize the stringent abortion laws and to provide easy access to safe and legal abortion services. This Act formed an exception to the criminalization provided under the Indian Penal Code and the same is evident from the opening words of section 3 of the act which states “notwithstanding anything contained in the Indian Penal Code.....”. In other words, this act was enacted with the objective of Health, Humanitarian, and eugenic measure to decriminalize the offence of abortion in certain circumstances and under the supervision of a Registered Medical Practitioner⁸. Section 3 of the Act provides for the conditions and circumstances under which abortion is permissible. Prior to the Amendment Act, 2021, section 3 provided that an abortion could be terminated by a Registered Medical Practitioner in the following situation:

- When the period of pregnancy does not exceed 12 weeks, one RMP and when the pregnancy is over 12 weeks but does not exceed 20 weeks, two RMPs, are of the good faith opinion that⁹:
 - a. “The continuance of the pregnancy would involve a risk to the life of the pregnant women or of grave injury to her physical or mental health or
 - b. There is a “substantial risk” that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.”

Therefore, abortion was allowed till 20 weeks of pregnancy. In addition to this, Clause 4 of section 3 provides that for abortion consent of a pregnant women is necessary except in case of minor girl where the written consent of her guardian is necessary.

⁸ Aparna Chandra, *Legal Barriers to Accessing Safe Abortion Services in India: A fact finding study*, (Dec. 29, 2023, 9:45) https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India_Final-for-upload.pdf

⁹ The Medical Termination of Pregnancy Act, 1971, sec. 3(2), No. 34, Act of Parliament, 1971 (India)

But this act of 1971, failed to meet the objective of the act and the needs of changing times due to its limited application such as act allowed abortion to married women only, abortion was permitted till twenty weeks subject to the opinion of two Registered Medical Practitioners. In order to meet the increasing demand, the act was amended in the year 2021 by the Medical Termination of Pregnancy Amendment Act, 2021 which extended the scope of the act by making it applicable on unmarried women and allowing abortion up to 24 weeks for certain classes of women prescribed under MTP Rules.

(A) Abortion of Minors under MTP Act:

Under section 3B of MTP Rules, the government of India had provided seven categories of women, who would be eligible for termination of pregnancies between 20 and 24 weeks and one of them is the “Minors” class. A minor can abort under the circumstances provided above and the requirement for the same is the written consent of her guardian as provided under section 3(4) of the act which read as follows: “No pregnancy of a women, who has not attained the age of eighteen years shall be terminated except with the consent in writing of her guardian.” This raises a question for consideration that does the clause completely dispenses with the consent of a minor or does it consider the consent of both minor women and her guardian and in the latter case, if the disparity arises between the consent of a minor pregnant women and her guardian, whose consent shall prevail. Due to the absence of any precedent on this matter, there exists a divergence of opinion among various courts in India on this very point. As in the case of *V. Krishnan v. G. Rajan*¹⁰, the Madras High Court was of the opinion that if a minor wished to continue her pregnancy, an abortion could not be performed only on the basis of her guardian’s consent, especially when the medical report did not indicate any foetal impairment and the minor was found to be fully aware of the consequences of pregnancy.¹¹ Similarly, in the case of *Marimuthu v. Inspector of Police*¹², “the court while relying on the convention on Rights of Child, the object of MTP Act and women’s right to autonomy and bodily integrity held that section 3(4) cannot be read to dispense with the consent of the minor where she wishes to continue her pregnancy. The court also discussed issues relating to teenage pregnancy, child marriage and the age of consent under the protection of children from sexual offences Act, 2012”. On the other hand, in the case of *Sundarlal v. State of M.P.*,¹³ The Madhya Pradesh High Court held “that it is not necessary to obtain a rape survivor’s willingness to terminate her

¹⁰ (1994) 2 MWN (Cri) 333

¹¹ *Securing Reproductive Justice in India*, (Dec. 29, 2023, 10:15) <https://reproductiverights.org/wp-content/uploads/2020/12/SecuringReproductiveJusticeIndia-Chpt05.pdf>

¹² (2016) 6 CTC 90

¹³ AIR 2018 (NOC 589) 205

pregnancy, where she is a minor and her guardian consents to such termination.” Hence, there is no consensus on this point, but it appears from the clause that it permits the consent of a minor girl to be dispensed with as long as her guardian’s written consent is available for performing abortion on her.

(B) Critical Analysis of section 3(4)(a) of the Act:

The legal framework relating to abortion, especially pertaining to the minors and their right to abortion, is not uniform and varies from one jurisdiction to another jurisdiction. For example, some states require parental notification before conducting abortion on minors, while some other states require parental consent which means parents must give their explicit consent before the minor may have the procedure. And India is also one of them where a law dealing with the abortion require the written consent of minor’s guardian before performing an abortion on a minor woman rather than her own consent. As per the Indian Majority Act, if no guardian is appointed, the age of majority is 18 years and where a guardian is appointed by the court, the age of majority is 21 years. Guardian here means a person having the care of the person of a minor i.e. guardian may be parents, husband or any other person taking care of a minor. But this requirement seems to be problematic and as a legal roadblock to the legal and safe abortion service for minors. Although the rationale behind this requirement may be to protect the interest of minors and to prevent them from any sort of exploitation, its practical implementation may not always fulfill this objective. As in some instances, this requirement can pose a challenge for minors depriving them of their right to reproductive choice. This clause can lead to negative consequences including delays in getting consent, possible conflicts with the minor's preferences, and even the situations where the minor is in such a relationship where she is unwilling or unable to engage a guardian. In addition, the requirement of guardian consent might unintentionally violate the minor's autonomy to make decisions regarding their reproductive health. And due to this barrier, minors may end up taking unnecessary risks with their health, using dangerous techniques of abortion, or being forced to carry their pregnancies to term against their choice. This clause has the following effects:

- **Right to Privacy:** The supreme court of India has consistently affirmed the Right to reproductive choice and bodily autonomy as a cornerstone of the Right to liberty and Privacy guaranteed under Article 21 of the Constitution. The right to reproductive autonomy includes the right to make “reproductive choices....to procreate as well as to abstain from procreating”. It was recognized by the Supreme Court that “*privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between*

one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. The family, marriage, **procreation**, and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised."¹⁴ And this right to reproductive autonomy and to life with dignity is not confined to adults only but is also available to minors because rights do not suddenly arise at the age of maturity. The same was recognized by the supreme court in the case of **Independent Thought v. Union of India**¹⁵, and it was held that *"the discussion on the bodily integrity of a girl child and the reproductive choices available to her is important to highlight that she cannot be treated as a commodity having no say over her body."*¹⁶ But the prerequisite of guardian consent for conducting an abortion on minors restricts the fundamental right to privacy of minors when it comes to their abortion. A minor's fundamental right to privacy gives them the right to make decisions about their body including reproductive choice without any interference of third person. Adolescents between the age of 14-17 years are considered mature enough to understand the complexities of sexuality and its consequences even though not considered mature for other purpose. In the modern era, where information is readily available through various sources such as the internet, television & many other sources, minors are well-informed about reproductive matters.

- In addition to this, in the current landscape teenagers are mostly engaged in consensual relationships and along with this they employ contraceptives to prevent pregnancies, highlighting their ability to take decisions which are in their best interest. And the same raises a pertinent question that if the teens are mature enough to use contraceptives to engage in sexual intercourse, then why they are not deemed mature to independently decide about their abortion?¹⁷
- In essence, the minor's personal interest is paramount when it comes to her pregnancy and its termination and the objective behind mandating the guardian consent should not extend to the extent that it violates the fundamental right to privacy of the minor. Essentially, the priority must be on safeguarding the minor's privacy and liberty while making such delicate

¹⁴ Suchita Srivastava v Chandigarh Administration [3 (2009) 9 SCC]

¹⁵ 2017 SCC Online SC 1222

¹⁶ *ibid.*

¹⁷ Kaitlyn Pangburn, *IT'S NO "MINOR" ISSUE: REFRAMING TRADITIONAL UNDERSTANDINGS OF MINORS' RIGHT TO BODILY AUTONOMY AND FREEDOM OF SEXUAL DECISION-MAKING*, <https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume29/winter2019/1-3-Pangburn.pdf>

and private decisions.

- Secondly, this clause does not take into account the grey area of early marriages which is widely practiced in most of the states of India. India is a country where the child marriage is still prevalent despite the legislations and various schemes dealing with the same. Child marriage is a marriage where either one or both of the parties to the marriage is a child. The child marriage causes certain effects both physically and psychologically on the child at an early age and one of them is the teenage pregnancy. This is evident from the survey conducted by NFHS which revealed that over 53% of currently married women between 15 years and 19 years of age have begun child conceiving.¹⁸ Abortion of these minor married women is also contingent upon the consent of a person who is taking the care of such women despite of the factor that she is married. Guardian may be her partner or parents or her in-laws. This condition violates minor women's right to decide to either have a baby, or abort or prevent pregnancy. For example, if a girl under eighteen years of age is married to an adult and gets pregnant before attaining majority, the law requires her to obtain her partner's consent for an abortion under the MTP Act, 1971. This condition persists even if she, as a mother, wishes to make her own decision about procreation. This raise concerns as the circumstance could possibly violate the minor women's right to reproductive autonomy. If her partner refuses to give consent, she may be compelled to continue the pregnancy against her will or explore other alternative methods to terminate it. This shows the conflict between legal requirements and the rights of married minor women to have autonomy over their body. Moreover, if a woman becomes pregnant for the second time before attaining the age of eighteen years, she would still be required to seek consent of her partner or parents for an abortion despite already being a parent herself because as per the law she is not competent to give the consent due to her minority.
- The requirement of guardian consent for performing abortion on minors seems inappropriate in cases where the pregnancy arises out of the underage sexual activity whether consensual or non- consensual, particularly within Indian context which considers intercourse outside marriage as sin. The fear of shame and stigma associated with the pregnancies outside the wedlock often compels families to coerce the girl into marrying her partner in cases where the intercourse was consensual or with a third person or with a person who raped her, rather than granting consent for abortion. This reflects the conflict between

¹⁸ Eisha Hussain, *Why India is Struggling with the burden of teen pregnancies*, Behanbox,(Dec.29, 2023, 11:40) <https://behanbox.com/2022/07/31/why-india-is-struggling-with-an-increased-burden-of-teen-pregnancies/#:~:text=This%20is%20clearly%20corroborated%20by,or%20more%20years%20of%20schooling.>

the law and social realities.

III. MINOR'S RIGHT TO ABORTION IN USA

In the USA, prior to 1973, the abortion was banned and criminalized as an offence except as a means of saving the life of the pregnant person. But in 1973, the status of abortion was changed by the Supreme Court of USA via the landmark case of *Roe v. Wade*¹⁹ where the court held that abortion is impliedly protected by the Due process clause provided in the Fourteenth Amendment and the Right to privacy provided by the Ninth Amendment²⁰. It was also held that Right to Privacy is not explicitly provided by the constitution, but the United States of Supreme court has recognized that 'a right to personal privacy and certain zones of privacy' exists under the constitution and is broad enough to include a women's decision whether or not to terminate her pregnancy and the right to abortion comes under her personal liberty.²¹ Furthermore, the court applied the trimester framework and held that during the first trimester of pregnancy the state should not interfere, and decision must be of pregnant women and the state's interest in the fetus became relevant only at "viability", the point at which the fetus could survive independently from the pregnant person. Therefore, this case gave the constitutional recognition to the right to abortion and extended the due process protection to minors as applicable to adult women.

Abortion laws in the United States is not uniform and varies by the state. When it comes to minors seeking abortion, different states have enacted different legislations. Some states mandate parental consent while others require notification to parents and some even require both the conditions for performing abortion on minors. This complex legal system relating to minors has been scrutinized by the Supreme Court of USA in various cases wherein it struck them as unconstitutional being violative of Due process clause which forbids state from depriving individuals of their fundamental right without any fair, just and reasonable procedure. As in the case of *Planned Parenthood v. Danforth*²² the court while striking down the Missouri provision which mandated minors to obtain written parental consent for performing abortion held that the state should not enact a blanket provision which requires parental consent for conducting abortion on minors as "any independent interest a parent may have in the termination of minor daughter's pregnancy is no more weighty than the right to privacy of the

¹⁹ 410 US 113 (1973)

²⁰ Brian Duignan, *Dobbs v. Jackson Women's Health Organization law case*, Britannica, <https://www.britannica.com/topic/Dobbs-v-Jackson-Womens-Health-Organization>

²¹ Sai Abhipsa Gochhayat, *Understanding of Right to Abortion under Indian Constitution*, Manupatra, <https://manupatra.com/roundup/373/Articles/PRESENTATION.pdf>

²² (1976) 428 U.S. 52

competent minor mature enough to have become pregnant.”²³ It also determined that mandating parent’s consent for abortion grants them absolute veto power over a minor’s decision of abortion and there is no reasonable justification in providing such a prerequisite and restricting abortion services for minors. Additionally, the court affirmed the rationale that a minor who is mature enough to become pregnant should also be mature enough to consent to an abortion²⁴. Further in the case of *Bellotti v. Baird*²⁵ the court while dealing with the minor’s right held that “a child merely on account of his minority is not beyond the protection of constitution” and compelling a minor to carry pregnancy against her will is “exceptionally burdensome for minor”²⁶. It further held that parents cannot have absolute veto power on abortion and parental consent is permissible as long as additional protection for minors exists. Therefore, this decision further showcased the court’s recognition of a minor’s individual autonomy as distinctly separate from her parents²⁷. Essentially, through these cases the US Supreme Court struck down the legislation mandating parental consent for abortion as being unconstitutional and arbitrary. In 2022, *Dobbs v. Jackson Women’s Health Organization*²⁸ case reviewed the constitutionality of abortion restrictive laws and overturned the 50 years of precedent of Roe’s case concluding that Constitution does not protect right to abortion as a fundamental right. After this decision, abortion rights will be determined on a state-to-state basis and allowed the states to impose restrictions on the exercise of abortion rights and even to ban it completely. As a result of the same, 13 states have currently banned abortion with narrow exceptions, with some bans making the medical professionals criminally liable for providing medical care.

IV. CONCLUSION

In conclusion, the requirement of guardian consent for performing the abortion on minors poses a significant legal barrier in accessing the abortion services. While the objective behind the same may be to involve guardians in decision making and prevent the minors from being exploited, it also adversely affects the fundamental right of privacy and bodily autonomy and integrity of the minor women. I think a minor women’s right to reproductive choice and personal and bodily autonomy should be respected as like adult women and shall not be devoid of this right only on the basis of minority because these rights do not depend upon the age of

²³ Ibid

²⁴ Kaitlyn Pangburn, *IT’S NO “MINOR” ISSUE: REFRAMING TRADITIONAL UNDERSTANDINGS OF MINORS’ RIGHT TO BODILY AUTONOMY AND FREEDOM OF SEXUAL DECISION-MAKING*, <https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume29/winter2019/1-3-Pangburn.pdf>

²⁵ (1979) 443 U.S. 622, 624

²⁶ Id.

²⁷ Id. At 637-39

²⁸ 597 U.S. 215 (2022)

majority but much more fundamental. Cases pertaining to a minor's abortion shall be decided as per the facts and circumstances of the case and not by applying the same formula of requiring the guardian consent for performing abortion. The Minor's consent shall not be dispensed with completely and guardian should not be given absolute veto power over the decisions relating to abortion because the most important interest in pregnancy and its termination is her own.
